

***United States Court of Appeals  
for the  
District of Columbia Circuit***



**TRANSCRIPT OF  
RECORD**



207

APPENDIX

IN THE  
UNITED STATES COURT OF APPEALS  
FOR THE  
DISTRICT OF COLUMBIA CIRCUIT

---

No. 24,629

---

UNITED STEELWORKERS OF AMERICA, AFL-CIO,  
Petitioner,

v.

FEDERAL TRADE COMMISSION,  
Respondent,

and

KENNECOTT COPPER CORPORATION,  
Intervenor.

---

ON PETITION FOR REVIEW OF AN ORDER  
OF THE FEDERAL TRADE COMMISSION

---

United States Court of Appeals  
for the District of Columbia Circuit

FILED DEC 7 1970

*Nathan J. Paulson*  
CLERK

APPENDIX

IN THE  
UNITED STATES COURT OF APPEALS  
FOR THE  
DISTRICT OF COLUMBIA CIRCUIT

---

No. 24,629

---

UNITED STEELWORKERS OF AMERICA, AFL-CIO,  
Petitioner,

v.

FEDERAL TRADE COMMISSION,  
Respondent,

and

KENNECOTT COPPER CORPORATION,  
Intervenor.

---

ON PETITION FOR REVIEW OF AN ORDER  
OF THE FEDERAL TRADE COMMISSION

---

TABLE OF CONTENTS

	page
Relevant docket entries-----	1
Motion of USWA to intervene as a party supporting the complaint (May 20, 1970)-----	12
Order granting permission to file brief and otherwise denying request (June 15, 1970)-----	18
Renewed motion to intervene (August 10, 1970)-----	20
Order granting leave to present oral argument and otherwise denying motion (August 28, 1970)-----	24



	page
Opposition by Respondent to motion of USWA to intervene (June 1, 1970) -----	26
Opposition by Respondent to renewed motion of USWA to intervene (August 20, 1970) -----	48
Opposition by Complaint Counsel to renewed motion of USWA to intervene (August 20, 1970) -----	56
Respondent's motion for reconsideration (September 10, 1970) -----	58
USWA's opposition to motion for reconsideration (September 15, 1970) -----	63
Memorandum of Complaint Counsel in support of Respondent's motion for reconsideration -----	66
Order denying Respondent's motion for reconsideration (September 25, 1970) -----	68
Respondent's motion for equal time (September 29, 1970) ----	70
Order allocating time for oral argument (October 3, 1970) --	73
USWA's motion to intervene as a party supporting the com- plaint in light of the standards enunciated by the Commission in its opinion and order of October 26, 1970, in Docket No. 8818 (December 1, 1970) -----	74
Memorandum of complaint counsel in opposition to USWA motion to intervene (December 7, 1970) -----	78
Respondent's opposition to third motion to intervene of United Steelworkers of America (December 7, 1970) --	80
Order of the Federal Trade Commission denying motion to intervene (December 18, 1970) -----	92

UNITED STATES OF AMERICA  
BEFORE FEDERAL TRADE COMMISSION, SS:

In the matter of

KENNECOTT COPPER CORPORATION, et al

DOCKET 8765  
DCCA 24,629

PAGES

1 - 12

13

14 - 16

17 - 19

20 - 35

36 - 39

40

41 - 43

44 - 47

1. Complaint issued - 8-5-68
2. Order by Acting Director, Hearing Examiners, appointing hearing examiner - 8-5-68
3. Motion by respondent for extension of time for filing answer, and for postponement of initial hearing - 8-26-68
4. Hearing examiner's order extending time for filing answer; cancelling initial hearing, subject to being reset on ten days notice; setting prehearing conference to consider simplification and clarification of the issues; stipulations or admissions, etc., and such other matters as may aid in the expeditious disposition of this proceeding, conference to be stenographically reported but not made public unless all parties so agree; and arranging for the exchange of lists of witnesses and documents between counsel - 9-5-68
5. Answer filed - 10-11-68
6. Motion by respondent for production by counsel supporting complaint of confidential documents - 10-11-68
7. Hearing examiner's order scheduling further prehearing conference for the purpose of receiving returns to subpoena duces tecum and for consideration of other appropriate matters - 10-11-68
8. Memorandum by counsel supporting complaint in response to motion by respondent for the production of confidential documents - 10-17-68
9. Hearing examiner's order directing counsel supporting complaint to produce copies of certain confidential documents within five days after service of this order - 10-21-68

	<u>PAGES</u>
10. Preliminary statement by respondent on the relevance of evidence relating to competition between coal and other fuels - 10-21-68	48 - 69
11. Motion by Consolidation Coal Company, for extension of time for filing motion to quash or limit subpoena and for production of documents in response to said subpoena, with certificate of service to counsel for respondent - 10-24-68	70 - 73
12. Motion by counsel supporting complaint to set place of hearing - 10-24-68	74 - 75
13. Motion by Atlantic Richfield Company, to quash subpoena duces tecum, or for an order directing acceptance in lieu of documents, of compilations to be submitted to a recognized accounting firm for integration with material supplied in response to similar subpoenas, etc., with certificate of service to counsel for respondent - 10-25-68	76 - 79
14. Motion by Union Pacific Railroad Company, for extension of time for filing motion to quash or limit subpoena duces tecum, with certificate of service to counsel for respondent - 10-25-68	80 - 82
15. Preliminary list of proposed witnesses submitted by respondent - 10-28-68	83 - 88
16. Motion by respondent for extension of time to submit document list and request for a pretrial hearing on admissibility of certain documents - 10-28-68	89 - 94
17. Hearing examiner's order setting hearings - 10-28-68	95 - 96
18. Response by counsel supporting complaint to preliminary statement by respondent on the relevance of evidence relating to competition between coal and other fuels - 10-28-68	97 - 105
19. Hearing examiner's order directing that respondent answer motions for extensions of time to respond to subpoenas duces tecum - 10-28-68	106
20. Motion by United States Steel Corporation, for extension of time for filing motion to limit or quash subpoena duces tecum - 10-28-68	107 - 108
21. Hearing examiner's order directing that the time in which Consolidation Coal Company, Union Pacific Railroad, and United States Steel Corporation may file motions to limit or quash subpoenas duces tecum or otherwise respond thereto is extended until further order - 10-28-68	109



PAGES

22. Hearing examiner's order setting the time for respondent to answer motion of Atlantic Richfield Company to quash or limit subpoena duces tecum - 10-28-68 110
23. Response by respondent to motion by counsel supporting complaint to set place of hearings - 10-29-68 111 - 112
24. Submission by counsel supporting complaint of list of documents pursuant to hearing examiner's order of October 21, 1968 - 10-29-68 113 - 116
25. Hearing examiner's order extending time for respondent to submit list of documents until further order - 10-31-68 117
26. Motion by respondent to quash subpoena ad testificandum issued to J. C. Kinnear, Jr. - 11-1-68 118 - 121
27. Answer by respondent to various motions by third parties for extension of time for filing motion to quash or limit subpoena duces tecum, etc., with certificate of service to counsel for four third party movants - 11-1-68 122 - 127
28. Motion by respondent to vacate order setting hearings - 11-1-68 128 - 138
29. Hearing examiner's order cancelling prehearing conference - 11-7-68 139
30. Motion by Kemmerer Coal Company, for extension of time for production of documents, etc., pursuant to subpoena duces tecum - 11-7-68 140 - 141
31. Hearing examiner's order directing that respondent shall furnish to counsel supporting complaint lists of witnesses; exhibits and related documents - 11-7-68 142
32. Telegram (treated as a motion) from Raymond A. Haile, attorney for Kaiser Steel Corporation, requesting extension of time for responding to subpoena duces tecum - 11-8-68 143
33. Hearing examiner's order extending time to third parties for responding to subpoena duces tecum, arranging for the time and place for such returns, without prejudice to such rights as the subpoenaed parties, etc. - 11-8-68 144 - 145
34. Hearing examiner's order postponing hearing, place or places to be designated by further order - 11-8-68 146

	<u>PAGES</u>
35. Copy of request for admissions served by counsel supporting complaint upon counsel for respondent at prehearing conference - 11-12-68	147 - 150
36. Motion by respondent for extension of time for filing answer to request by counsel supporting complaint for admissions - 11-12-68	151 - 152
37. Hearing examiner's order extending time to respondent for filing answer to request for admissions - 11-12-68	153
38. Answer by respondent to request by counsel supporting complaint for admissions, with affidavit - 11-27-68	154 - 168
39. Hearing examiner's order cancelling prehearing conference - 11-29-68	169
40. Response by Kemmerer Coal Company to subpoena duces tecum - 12-2-68	170 - 178
41. Hearing examiner's order cancelling prehearing conference - 12-6-68	179
42. Hearing examiner's order setting further prehearing conference and extending time to respondent for submittal of witness and exhibit lists - 12-16-68	180
43. Hearing examiner's order postponing hearing and directing that hearing shall continue without substantial interruption at the place or places of further hearings to be determined at prehearing conference - 12-19-68	181
44. Witness list submitted by respondent - 12-27-68	182 - 189
45. List of documents submitted by respondent - 12-27-68	190 - 203
46. Motion by counsel supporting complaint to require more responsive answer to request for admissions, with copies of documents numbers 44, 103, 111 and 190 - 12-30-68	204 - 214
47. Motion by respondent requesting that Commissioner Jones withdraw from participation, or in the alternative, that the Commission determine that she is disqualified from participation in this proceeding, with exhibits A and B - 12-31-68	215 - 233
48. Hearing examiner's order certifying to the Commission the motion by respondent to disqualify Commissioner Jones from participation in this proceeding - 1-7-69	234
49. Request by counsel supporting complaint for admissions as to certain facts, with attachments - 1-8-69	235 - 253

PAGES

Request by counsel supporting complaint for admissions by respondent as to facts - 1-9-69	254
Answer by respondent to motion by counsel supporting complaint to require a more responsive answer to request for admissions - 1-13-69	255 - 260
Motion by counsel supporting complaint for reconsideration of hearing examiner's decision regarding schedule of hearings - 1-13-69	261 - 263
Motion by respondent for extension of time for filing supplemental document list - 1-14-69	264 - 265
Hearing examiner's order extending time to respondent for filing list of documents; and directing that respondent file an answer not later than January 21, 1969, to motion by counsel supporting complaint for reconsideration and modification of hearing examiner's order regarding scheduling of hearings - 1-14-69	266
Motion by Atlantic Richfield Company, for extension of time for compliance with subpoena issued December 31, 1968, with certificate of service to counsel for respondent - 1-14-69	267 - 269
Supplement by respondent to witness list filed December 27, 1968 - 1-15-69	270 - 271
Answer by respondent to request for admissions filed January 8, 1969, by counsel supporting complaint - 1-21-69	272 - 277
Answer by respondent to request for admissions filed January 9, 1969, by counsel supporting complaint - 1-21-69	278 - 280
Answer by respondent to motion by counsel supporting complaint for reconsideration and modification of hearing examiner's order regarding schedule of hearings - 1-21-69	281 - 289
Supplement to list of documents filed by respondent - 1-21-69	290 - 296
Hearing examiner's order denying motion by counsel supporting complaint for reconsideration and modification of decision regarding schedule of hearings - 1-23-69	297
Hearing examiner's order extending time to Atlantic Richfield Company for responding to subpoena duces tecum, with the understanding that specified data as provided in subpoena will be produced or furnished not later than February 3, 1969, to Price, Waterhouse & Company - 1-23-69	298



	<u>PAGES</u>
63. Hearing examiner's order granting telephonic motion of Standard Oil Company of California for extension of time for responding to subpoena duces tecum, etc. - 1-24-69	299
64. Motion by counsel supporting complaint for admission of certain exhibits into evidence without limitations, with memorandum in support - 2-12-69	300 - 311
65. Hearing examiner's order setting further hearing - 2-13-69	312
66. Memorandum by respondent in answer to complaint counsels' offer of certain documents as admissions of respondent - 2-14-69	313 - 324
67. Application by respondent for <u>in camera</u> treatment of certain documents - 2-14-69	325 - 334
68. Hearing examiner's order scheduling hearings in various places; and directing that rebuttal hearings shall follow as soon as practicable - 2-27-69	335
69. Hearing examiner's order postponing hearings in New York - 4-1-69	336
70. Hearing examiner's notice setting time and place of hearing - 5-28-69	337
71. Order denying motion by respondent to disqualify Commissioner Jones from participation in this proceeding, with memoranda attached. Commissioners Dixon, MacIntyre and Nicholson voted in the affirmative, Commissioner Elman voted in the negative, and Commissioner Jones did not participate - 6-13-69	338 - 348
72. Request by respondent for the fixing of dates for filing proposed findings and replies thereto - 6-16-69	349 - 351
73. Motion by counsel supporting complaint requesting specific period for filing of proposed findings and replies thereto - 6-17-69	352 - 354
74. Hearing examiner's order specifying September 9, 1969, as date for filing proposed findings, and October 9, 1969, for filing replies thereto, provided, however that this order is contingent on approval by the Commission of request for extension of time for filing the initial decision - 6-18-69	355
75. Application by hearing examiner for extension of time in which to file the initial decision - 6-18-69	356 - 357
76. Stipulation between counsel as to corrections of the transcript, with attachments - 7-2-69	358 - 431

	<u>PAGES</u>
77. Motion by respondent for an order further correcting the transcript - 7-7-69	432 - 434
78. Order extending time for filing the initial decision - 7-8-69	435
79. Hearing examiner's order setting August 25, 1969, as the date for filing proposed findings and supporting briefs, and replies thereto shall be filed September 15, 1969; and directing that this order shall supersede the provisional order dated June 17, 1969 - 7-10-69	436
80. Motion by respondent for reconsideration by the Commission of its order extending time only to November 1, 1969, for filing of the initial decision - 7-15-69	437 - 440
81. Answer by counsel supporting complaint to motion by respondent for an order further correcting the transcript - 7-16-69	441 - 442
82. Hearing examiner's order certifying to the Commission of motion by respondent for reconsideration of order extending time for filing the initial decision - 7-16-69	443 - 445
83. Order extending time within which to file the initial decision - 7-17-69	446
84. Stipulation between counsel as to corrections of the transcript, with attachments - 7-29-69	447 - 467
85. Hearing examiner's order approving stipulations filed July 2, and July 29, 1969, and directing that corrections, as stipulated, be made in the transcript - 8-20-69	468 - 469
86. Proposed findings, conclusions and order by counsel supporting complaint - 9-10-69	470 - 606
87. Proposed findings, conclusions and order by respondent - 9-10-69	607 - 794
88. Brief by respondent in support of proposed findings - 9-10-69	795 - 894
89. Reply by counsel supporting complaint to proposed findings by respondent - 10-9-69	895 - 949
90. Reply by respondent to proposed findings by counsel supporting complaint - 10-9-69	950 - 1094
91. Hearing examiner's request for extension of time for filing the initial decision - 12-9-69	1095 - 1096



	<u>PAGES</u>
92. Order extending time for filing the initial decision. Commissioners Dixon, Elman, MacIntyre and Jones voted in the affirmative - 12-10-69	1097
93. Hearing examiner's request for further extension of time for filing the initial decision - 1-8-70	1098
94. Order extending time for filing the initial decision - All Commissioners voted in the affirmative - 1-13-70	1099
95. Stipulation between counsel of corrections to the transcript, with exhibits A-89 to A-92 - 1-19-70	1100 - 1105
96. Hearing examiner's request for further extension of time for filing the initial decision - 2-16-70	1106 -
97. Order granting further extension of time for filing the initial decision. All Commissioners voted in the affirmative - 2-24-70	1107 - 1108
98. Hearing examiner's order denying request by respondent for continued in camera treatment of Commission exhibits 11, 124A-N, 125A-C, 154A-Z-7, 163, 164A-H and 196A-E; and directing that each of these exhibits, as well as respondents exhibit 186, be removed from in camera status and placed in the public record - 3-9-70	1109 - 1114
99. Hearing examiner's supplemental order correcting the transcript - 3-9-70	1115 - 1119
100. Hearing examiner's initial decision and order dismissing complaint - 3-9-70	1120 - 1329
101. Motion by respondent to place <u>in camera</u> on an <u>ad interim</u> basis certain exhibits pending the filing and disposition of a motion to review hearing examiner's order denying in camera treatment of said documents; and request for time within which to file motion with respect to continuing in camera status, with attachment - 3-13-70	1330 - 1342
102. Order directing that the effective date of hearing examiner's order of March 9, 1970, removing certain exhibits from in camera status, is suspended until fifteen days after service of this order unless respondent files its motion to review said order, in which latter case the effective date thereof shall be suspended until further order of the Commission, etc. - 3-19-70	1343 - 1344

	<u>PAGES</u>
103. Notice by counsel supporting complaint of appeal from hearing examiner's initial decision - 3-23-70	1345
104. Motion by counsel supporting complaint for extension of time for filing appeal from hearing examiner's initial decision, and request for permission to file said appeal in excess of sixty but not to exceed one hundred twenty pages - 3-30-70	1346 - 1347
105. Order extending time to counsel supporting complaint for filing appeal from hearing examiner's initial decision; and directing that the page limit is extended from sixty pages to, but not to exceed, one hundred twenty pages - 3-30-70	1348
106. Motion by respondent for review of hearing examiner's order of March 9, 1970, denying continued in camera treatment for eight documentary exhibits - 4-3-70	1349 - 1368
107. Motion by counsel supporting complaint for extension of time for filing appeal from hearing examiner's initial decision - 5-11-70	1369 - 1370
108. Order extending time to counsel supporting complaint for filing appeal from hearing examiner's initial decision - 5-12-70	1371
109. Brief by counsel supporting complaint - Appeal from hearing examiner's initial decision - 5-19-70	1372 - 1496
110. Motion by United Steelworkers of America, AFL-CIO, to intervene as a party supporting the complaint, with brief for intervenor, and certificate of service - 5-20-70	1497 - 1530
111. Opposition by respondent to motion by United Steelworkers of America, AFL-CIO, to intervene as a party supporting the complaint, and to submit a brief in support thereof. - 6-1-70	1531 - 1552
112. Motion by respondent for extension of time for filing answer to appeal by counsel supporting complaint from hearing examiner's initial decision; and requesting permission to file said brief in excess of sixty pages but not to exceed one hundred and fifty pages - 6-3-70	1553 - 1557
113. Order extending time to respondent for filing answer to appeal from hearing examiner's initial decision; and directing that the number of pages allowed is increased from sixty to not more than one hundred and twenty pages - 6-4-70	1558

	<u>PAGES</u>
114. Motion by respondent for extension of time for filing answering brief, with attachment - 6-10-70	1559 - 1562
115. Order extending time to respondent to file answering brief - 6-12-70	1563
116. Order granting United Steelworkers of America permission to file a brief in connection with appeal filed by complaint counsel and directing that such brief be received and filed; and further directing that request of United Steelworkers of America be and hereby is denied at this time in all other respects and without prejudice - Commissioners Weinberger, Dixon and MacIntyre voted in the affirmative and Commissioners Elman and Jones would have granted the petition to intervene - 6-15-70	1564 - 1565
117. Notice setting oral argument upon appeal by counsel supporting complaint from hearing examiner's initial decision - 6-19-70	1566
118. Brief by respondent - Answer to appeal from hearing examiner's initial decision - 8-6-70	1567 - 1686
119. Renewed motion by United Steelworkers of America, to intervene as a party supporting the complaint, and as part of such intervention to participate in the oral argument, with certificate of service to counsel supporting complaint and to counsel for respondent - 8-10-70	1687 - 1691
120. Motion by counsel supporting complaint for extension of time for filing reply to answer to appeal from hearing examiner's initial decision - 8-11-70	1692
121. Order extending time to counsel supporting complaint for filing reply to answer to appeal from hearing examiner's initial decision - 8-14-70	1693
122. Answer by counsel supporting complaint to renewed motion of United Steelworkers of America to intervene - 8-20-70	1694 - 1695
123. Answer by respondent to renewed motion of United Steelworkers of America to intervene, with certificate of service to counsel for United Steelworkers - 8-20-70	1696 - 1704

PAGES

124. Order granting permission to United Steelworkers of America to present oral argument October 27, 1970, in support of the complaint, and denying in all other respects its motion filed August 10, 1970. Commissioners MacIntyre and Dixon voted in the affirmative, Commissioner Jones concurred in the result and Commissioner Elman did not participate - 8-28-70 1705 - 1706
125. Brief by counsel supporting complaint -  
Reply to answer by respondent to appeal from hearing examiner's initial decision - 9-2-70 1707 - 1742
126. Motion by respondent for reconsideration of order granting permission to United Steelworkers of America to present oral argument, with certificate of service - 9-10-70 1743 - 1748
127. Answer by United Steelworkers of America to motion by respondent for reconsideration of order allowing United Steelworkers of America opportunity to present oral argument, with certificate of service - 9-16-70 1749
128. Memorandum by counsel supporting complaint in support of motion by respondent for reconsideration of order granting United Steelworkers of America leave to present oral argument in this matter - 9-18-70 1753A - 1753B
129. Order denying motion by respondent for reconsideration of order allowing United Steelworkers of America permission to present oral argument. Commissioners Kirkpatrick, Dixon and MacIntyre voted in the affirmative, and Commissioners Elman and Jones did not participate - 9-25-70 1754A - 1754B
130. Order reallocating the time granted to the parties for oral argument. Commissioners Kirkpatrick, Dixon, MacIntyre and Jones voted in the affirmative, and Commissioner Elman did not participate. 10-2-70 1755 - 1756
131. Testimony - (Pages 1 to 6440, incl.) 1757 - 8096
132. Exhibits - Documentary - Commission (Exhibit 191 lost) 8097 - 9590  
Exhibits - Documentary - Respondent (Exhibit 17 lost) 9591 - 10456
133. Public Docket Sheets - 10457 - 10465

UNITED STATES OF AMERICA

IN THE MATTER OF

KENNECOTT COPPER CORPORATION,)

A Corporation

Docket No. 8765

MOTION OF UNITED STEELWORKERS OF AMERICA, AFL-CIO  
TO INTERVENE AS A PARTY SUPPORTING THE COMPLAINT

United Steelworkers of America, AFL-CIO (hereinafter "USWA") moves to intervene in this proceeding as a party supporting the complaint.

USWA is a labor organization with approximately one and one-quarter million active members. These members, with their wives, represent more than one percent of the entire population of the United States; with their other dependents as well, they represent from two to three percent of the entire population of the United States.

USWA represents employees in the steel, aluminum, iron ore and metal fabricating industries, and, most germane to the instant proceeding, USWA is the predominant union in the copper industry. The majority of the bargaining unit copper employees of Respondent Kennecott Copper Corporation are represented by USWA. The same is true of Kennecott's copper competitors.

USWA has been alarmed by Kennecott's acquisition of Peabody from the time it was first announced. That alarm has been manifested to the Federal Trade Commission previously. In a letter dated January 9, 1968, to Chairman Paul Rand Dixon, USWA's President I. W. Abel strongly urged the Commission to issue a complaint challenging the acquisition. USWA has also campaigned actively to stem the tide of other conglomerate mergers and acquisitions which it believes threaten the public interest in preserving competition, on the legislative front, in its journal which has a circulation of more than one and one-quarter million copies, and before the Commission. (See, e.g., the Steelworkers' opposition to the Commission's proposed settlement of the Textron acquisition of Fafnir Bearing Company, filed March 24, 1970). The Commission itself has heretofore recognized USWA's interest in the conglomerate field, quoting from USWA's journal in FTC, Economic Report on Corporate Mergers, at pages 455-456.

A Hearing Examiner has now issued an initial decision holding that Kennecott's acquisition of Peabody did not violate Section 7 of the Clayton Act, as amended (15 U.S.C. §18), and dismissing the complaint. USWA strongly disagrees with this result, and seeks intervention as a party to urge its reversal by the Commission. USWA's intervention cannot delay the ultimate resolution of this case. This motion, and our accompanying brief on the merits, are being filed within the time limit for the filing of complaint



counsel's brief. Accordingly, Respondent will be able to respond to our brief at the same time it responds to that of the complaint counsel.

USWA is entitled to intervene as a party to this proceeding for several different reasons. We enumerate them below:

1. Seventy percent of all steam coal mined in the United States is consumed by the electric utility industry (I.D. 29)<sup>1/</sup> All, or virtually all, of USWA's members are customers of electric utility companies. Since 1960, coal has filled 65 percent of the fuel demands of that industry (I.D. 29). The fuel cost of an electric utility is the single largest item of its operating costs (I.D. 59). Any rise in the price of coal inevitably will be reflected in higher electric bills to USWA's members. USWA's members therefore have a direct interest in upsetting mergers and acquisitions which threaten to substantially lessen competition in the coal industry. They have authorized USWA to intervene in this proceeding to advance those interests (USWA Constitution, Article II, Paragraphs Third and Fifth).

2. USWA is also entitled to intervene to assert the "interest of the public" in preserving full and free competition. Citizens Committee for the Hudson Valley v. Volpe, No. 34010 (slip. opinion, page 2343; 2d Cir., April 16, 1970). USWA has "proved the genuineness of [its] concern by demonstrating that [it is] 'willing to shoulder the burdensome and costly processes of intervention'

---

<sup>1/</sup> Throughout this motion and the accompanying brief, we shall refer to the Initial Decision as "I.D."

in an administrative proceeding." Citizens Committee, supra, at page 2345; United Church of Christ v. F.C.C., 359 F. 2d 994, 1005 (D.C. Cir. 1966). It has "by [its] activities and conduct ... exhibited a special interest in" preserving the competition threatened by the acquisition. Citizens Committee, supra, at pages 2345-56; Scenic Hudson Preservation Conf. v. F.P.C., 354 F. 2d 608, 616 (2d Cir. 1965). Section 7 of the Clayton Act was enacted "to create express statutory protection for the public's interest in" competition, "and organizations with a demonstrated concern" for the preservation of that interest may "claim that statutory protection for the public." Citizens Committee, supra, page 2347. Of course, complaint counsel is dedicated to advance the public interest, as is the Commission itself, but that does not bar a responsible private "representative of the public" (Citizens Committee, supra, page 2349), from participating as well. United Church of Christ, supra. See also Associated Industries of the State of New York v. Ickes, 134 F. 2d 694, 704 (2d Cir. 1943); Scripps Howard Radio, Inc. v. F.C.C., 316 U.S. 4 (1942); F.C.C. v. Sanders Brothers Radio Station, 309 U.S. 470 (1940).

3. Our need to intervene -- both as representative of USWA's members and as representative of the public -- is heightened by the realization that there is no existing party in this case who can or would challenge the Commission's decision if it affirms the Initial Decision. While Kennecott can appeal a decision adverse to Kennecott, the complaint counsel cannot appeal a decision favorable to Kennecott. Our intervention will assure the availability of judicial review should the Commission affirm the Initial Decision.



4. Finally, USWA foresees evils which will flow from this acquisition transcending those which were legislated against in Section 7 of the Clayton Act. While these evils are not subject to correction by the Commission, they are nonetheless real, and they reinforce USWA's determination to secure Kennecott's divestiture of Peabody;

(a) Kennecott's employees live in mining towns owned or controlled by Kennecott. Mining communities, more than any other, are wholly dependent for their social and economic life upon the decisions of the corporations which control them. Historically, this unique power which the copper companies, like Kennecott, have held over their employees' lives has carried with it a concomitant sense of responsibility and sensitivity. Conglomeration portends the end of such beneficence. It is very doubtful that the security and stability of copper towns and their inhabitants will any longer be a factor when major decisions are made at a conglomerate's corporate headquarters far removed from the affected mining towns. The record in the instant case tells one such story, albeit in a coal mining town. When Kennecott bought Knight Ideal's coal reserves, it decreed that the mine then operating be closed and sealed (I.D. 106). The union representing the affected employees was bluntly told that there would be no further work for the men (I.D. 124). But for that acquisition, these men might still be working today. Conglomerate zeal had lifted management's eyes from civic responsibility to the balance sheet. The much larger acquisition of Peabody will lift them further still.

- 6 -

(b) Conglomeration plays havoc with labor relations.

Employers and employees have achieved a relative bargaining power which represents the workers' ability to strike and management's ability to absorb the consequences of such a strike. Conglomeration throws that balance out of kilter. A conglomerate, with income coming from two or more industries, can withstand a strike in one industry better than a company whose entire fate is tied to that industry. Employees whose bargaining power is thus diminished must suffer the threat of substandard bargaining settlements or else seek to harness their bargaining power to that of the employees in the conglomerate's other industries. The latter course, in turn, may result in multi-industry strikes. All of these phenomena were recognized in the F.T.C.'s Economic Report on Corporate Mergers, at pages 453-457. Our national labor policy has been directed toward seeking more peaceful solutions to labor relations disputes, and toward avoidance of labor disputes which endanger the national health and safety. Conglomeration works directly contrary to these societal objectives.

For all of the foregoing reasons, USWA is entitled to intervene herein as a party supporting the complaint.

Respectfully submitted,



Michael H. Gottesman  
1001 Connecticut Avenue, N. W.  
Washington, D. C. 20036

Of Counsel:

Bernard Kleiman  
10 South LaSalle Street  
Chicago, Illinois 60603

Elliot Bredhoff  
George H. Cohen  
Bredhoff, Gottesman & Cohen  
1001 Connecticut Avenue, N. W.  
Washington, D. C. 20036

Attorney for United Steelworkers  
of America, AFL-CIO

UNITED STATES OF AMERICA  
BEFORE FEDERAL TRADE COMMISSION

-18-

COMMISSIONERS:

Caspar W. Weinberger, Chairman  
Paul Rand Dixon  
Philip Elman  
Everette MacIntyre  
Mary Gardiner Jones

In the Matter of  
  
KENNECOTT COPPER CORPORATION,  
a corporation.

DOCKET NO. 8765

ORDER GRANTING PERMISSION  
TO FILE BRIEF AND OTHER-  
WISE DENYING REQUEST

This matter is before the Commission on the motion filed May 20, 1970 by United Steelworkers of America, AFL-CIO, requesting permission to intervene in this proceeding on the basis that (1) it will represent the interests of its membership as consumers of electricity, (2) it will represent the "interest of the public" in preserving full and free competition, (3) it will assertedly assure the availability of judicial review, and (4) it will represent the interests of labor in certain alleged labor-related "evils" flowing from the acquisition; and upon respondent's opposition thereto filed June 1, 1970; and

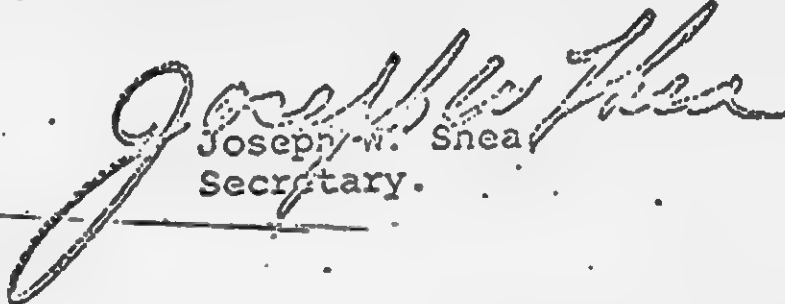
The Commission having determined that such request should be granted to the extent of permitting the filing of the brief submitted by United Steelworkers of America, AFL-CIO, along with its motion, and otherwise denied:

IT IS ORDERED that the United Steelworkers of America, AFL-CIO, be, and it hereby is, granted permission to file a brief in connection with the appeal filed by complaint counsel in this proceeding and that such brief, which is attached to its motion to intervene, be, and it hereby is, received and filed.

IT IS FURTHER ORDERED that the request of United Steelworkers of America, AFL-CIO, be, and it hereby is, denied at this time in all other respects and without prejudice.

By the Commission. Commissioners E'man and Jones would have granted the petition to intervene at this time.

SEAL :

  
Joseph W. Snea  
Secretary.

ISSUED: June 15, 1970

UNITED STATES OF AMERICA

BEFORE FEDERAL TRADE COMMISSION

In the Matter of  
KENNECOTT COPPER CORPORATION,  
a corporation.

Docket No. 8765

## RENEWED MOTION TO INTERVENE

United Steelworkers of America, AFL-CIO (hereinafter "USWA")  
renews its motion to intervene as a party supporting the complaint,  
and as part of said intervention requests permission to participate  
in the oral argument herein. In support of this motion, USWA shows  
as follows:

1. On May 20, 1970, USWA moved to intervene as a party in this proceeding, and submitted with its motion a brief on the merits which it desired to file. USWA's motion to intervene set forth grounds which, USWA contended, entitled it to intervene as a matter of right.

2. On June 15, 1970, the Commission entered an "Order Granting Permission to File Brief and Otherwise Denying Request" which stated, in pertinent part:

"IT IS ORDERED that the United Steelworkers of America, AFL-CIO, be, and it hereby is, granted permission to file a brief in connection with the appeal filed by complaint counsel in this proceeding

and that such brief, which is attached to its motion to intervene be, and it hereby is, received and filed.

"IT IS FURTHER ORDERED that the request of United Steelworkers of America, AFL-CIO, be, and it hereby is, denied at this time in all other respects and without prejudice.

"By the Commission. Commissioners Elman and Jones would have granted the petition to intervene at this time." (Emphasis added.)

3. USWA believes that, to the extent that this order denied USWA's motion to intervene, the order violated USWA's legal right, as an interested person, to participate as a full-fledged party before the Commission. (In addition to the cases cited in USWA's original motion, see the Supreme Court's recent decisions in Association of Data Processing Service Orgs. v. Camp, 397 U.S. 150 (1970) and Barlow v. Collins, 397 U.S. 159 (1970), both of which strongly support USWA's claim to intervene as of right.) However, inasmuch as the denial was only "at this time . . . and without prejudice", USWA believes that a court challenge of the denial would be premature at this time. Instead, USWA is renewing its motion to intervene, and will set forth below the role which it would play if granted party status.

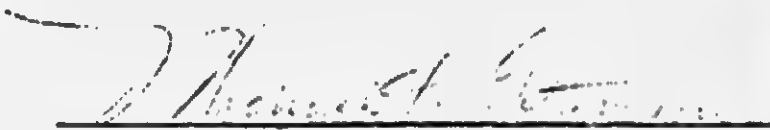
4. USWA desires to intervene for two remaining purposes:

(a) to participate in the oral argument of this case before the

Commission; and (b) to assure USWA's standing to seek judicial review of the Commission's ultimate decision, in the event that that decision fails to order Kennecott's divestiture of Peabody. The first of these objectives is self-explanatory. The second warrants brief comment. The Administrative Procedure Act authorizes any "person . . . adversely affected or aggrieved by agency action" to seek judicial review thereof. 5 U.S.C. § 702. It may well be that USWA would be considered such a "person" even if its motion to intervene herein as a party were denied. However, this question is not wholly free from doubt. As noted in our original motion, there is no existing party who could seek judicial review of a Commission decision favoring Kennecott. USWA seeks to assure the availability of such judicial review by acquiring full-party status before the Commission, thereby eliminating a possible obstacle to its standing to seek review. Since Kennecott has the right to challenge a Commission decision adverse to it, considerations of fair play dictate that those who seek the opposite result have the right to challenge a Commission decision favorable to Kennecott. Indeed, we submit that the Commission will best effectuate the public interest, and assure public respect for the administrative process, by ruling in a manner which does not appear to insulate its decisions from subsequent judicial scrutiny.

WHEREFORE, USWA prays that it be permitted to intervene as a party supporting the complaint, and as part of such intervention to participate in the oral agreement.

Respectfully submitted, .



---

Michael H. Gottesman  
1001 Connecticut Ave., N.W.  
Washington, D. C. 20036

Of Counsel:

Bernard Kleiman  
Chicago, Illinois

Elliot Bredhoff  
George H. Cohen  
Bredhoff, Gottesman & Cohen  
1001 Conn. Ave., N.W.  
Washington, D. C.

Attorney for United Steelworkers  
of America, AFL-CIO



UNITED STATES OF AMERICA  
BEFORE FEDERAL TRADE COMMISSION

COMMISSIONERS:

Everette MacIntyre, Acting Chairman  
Paul Rand Dixon  
Philip Elman  
Mary Gardiner Jones

In the Matter of  
  
KENNECOTT COPPER CORPORATION,  
a corporation.

DOCKET NO. 8765

ORDER GRANTING  
LEAVE TO PRESENT  
ORAL ARGUMENT AND  
OTHERWISE DENYING MOTION

This matter is before the Commission upon the submission filed by United Steelworkers of America, AFL-CIO renewing its motion to intervene in this proceeding as a party supporting the complaint, and as part of such intervention requesting permission to participate in the oral argument herein. Respondent and counsel supporting the complaint on August 20, 1970, separately filed submissions opposing such motion.

The Commission on June 15, 1970 granted United Steelworkers of America, AFL-CIO, permission to file a brief herein in connection with the appeal filed by complaint counsel and otherwise denied at that time and without prejudice its motion to intervene. The Commission has determined that the renewed motion should be granted to the extent of permitting United Steelworkers of America, AFL-CIO, to appear and present oral argument and that it should be otherwise denied. Accordingly,

IT IS ORDERED that the United Steelworkers of America, AFL-CIO, be, and it hereby is, granted permission, in addition to that heretofore granted to file a brief herein, to appear in this proceeding on October 27, 1970, for the purpose of presenting oral argument in support of the complaint, for which it will be allowed forty five (45) minutes.

BEST COPY AVAILABLE

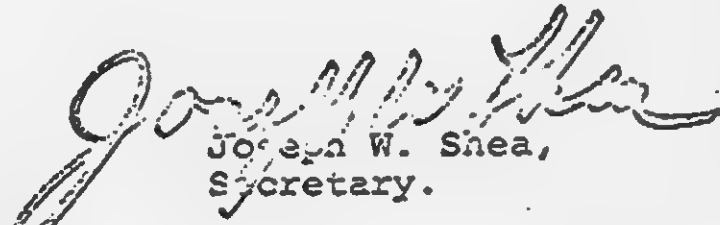
from the original bound volume

D. 8765

IT IS FURTHER ORDERED that the motion of United Steelworkers of America, AFL-CIO, be and it hereby is denied in all other respects.

By the Commission, Commissioner Elman not participating, and Commissioner Jones concurring in the result but adhering to the view that movant should have been granted leave to intervene, as set forth in her separate statement in the Commission's Order of June 15, 1970, Granting Permission to File Brief and Otherwise Denying Request.

S E A L



Joseph W. Shea,  
Secretary.

ISSUED: August 28, 1970

UNITED STATES OF AMERICA  
BEFORE FEDERAL TRADE COMMISSION

In the Matter of

*Peabody*  
KENNECOTT COPPER CORPORATION,  
a corporation.

Docket No. 8765

OPPOSITION BY RESPONDENT TO MOTION OF UNITED  
STEELWORKERS OF AMERICA, AFL-CIO, TO INTERVENE  
AS A PARTY SUPPORTING THE COMPLAINT AND TO  
SUBMIT A BRIEF IN SUPPORT THEREOF

Respondent Kennecott Copper Corporation ("Kennecott") objects to the motion of the United Steelworkers of America, AFL-CIO, ("USWA") served upon respondent on May 21, 1970 to intervene as a party in support of the Complaint in this proceeding and to submit a brief in support thereof. The motion is without legal or factual basis and is belated. Moreover, it is an unprecedented attempt to inject complex issues of labor-management relations into an already complex litigation involving an alleged violation of Section 7 of the Clayton Act. In support of its opposition to this motion, respondent shows:

PRELIMINARY STATEMENT

This matter is now before the Commission on appeal by complaint counsel from the Initial Decision, filed by the Examiner on March 9, 1970. The Initial Decision is 206 pages long, and it discusses in detail a number of complex factual issues and the application of controlling legal standards to such issues. The Initial Decision notes (p. 2) that there were 48 days of hearings at which 54 witnesses gave testimony and that the record consists of more than 6400 pages of transcript and about 450 exhibits comprising several thousand pages. Complaint counsel have filed a brief of 119 pages.

The USWA is not a proper intervenor in this case, particularly at this stage. Section 11 of the Clayton Act, 15 U.S.C. §21(b), which governs intervention in Section 7 cases before the Commission, provides, in pertinent part, that "any person may make application, and on good cause shown may be allowed by the Commission or the Board, to intervene and appear in said proceeding by counsel or in person." (Section 5(b) of the Federal Trade Commission Act, 15 U.S.C. §45(b), similarly provides that "any person, partnership or corporation may make

application, and upon good cause shown may be allowed by the Commission to intervene and appear in said proceedings by counsel or in person.") Section 3.14 of the Commission's Rules of Practice for Adjudicative Proceedings provides that "the Commission may by order permit the intervention to such extent and upon such terms as are provided by law or as otherwise may be deemed proper."

Although the USWA claims to have manifested "alarm" about the subject of this proceeding since at least January 9, 1968 (Motion, p. 2), it did not move to intervene before the Examiner in order to present evidence or to cross-examine witnesses called by the parties. At this point, with the record closed, the motion to intervene comes too late. Orderly procedures dictate that a party interested in a proceeding make application to intervene at the earliest opportunity, and in any event, before the holding of the evidentiary hearing.

In this case, however, almost a year after the conclusion of evidentiary hearings herein, USWA files its motion to intervene as a party, alleging that its intervention is necessary to:

- (1) Protect the interests of its membership as consumers of electricity from higher electricity costs which may result from higher coal prices which somehow may result from

Kennecott's acquisition of Peabody;

(2) Protect "the interest of the public" in preserving full and free competition, even though the Federal Trade Commission, an agency of the U. S. Government, is charged with this specific responsibility;

(3) "Assure the availability of judicial review" in the event the Commission, in accordance with its established procedures to review the record before it, decides in its judgment to affirm the Initial Decision ordering the Complaint dismissed; and

(4) Prevent "evils" which allegedly flow from the acquisition in the area of labor relations, but which are admittedly "not subject to correction by the Commission." (Motion, p. 5)<sup>1/</sup> .

---

<sup>1/</sup> In the interest of accuracy, we note that the USWA's version of the facts with respect to the fate of the former employees of Knight-Ideal Coal Company -- the only record facts discussed in the Motion (p. 5) -- is distorted. After being advised that Kennecott had purchased only the Knight-Ideal coal reserves and had no plans for operating the mine, Union officials representing the thirty or so affected employees were told that Kennecott would give these men preferential hiring treatment at Kennecott's Utah facilities (Flynn 3904-06; RX 85 a-b). Only 10 or 11 of these employees indicated any interest at all in employment by Kennecott, and of this number only two or three followed up this interest by making application for employment. Kennecott's job offers to these individuals, however, were not accepted, mainly because Kennecott was required by its Union contract to offer them employment at the lowest entry level (Flynn 3907-09).

None of these grounds, nor the authorities offered in support thereof, is sufficient to support the USWA's intervention in this proceeding as a party with all of the rights accorded such status. Rather, it is clear that the USWA has not shown "good cause" for intervention as required by statute.

#### ARGUMENT

1. The USWA has no right to intervene in these proceedings.

The Clayton and Federal Trade Commission Acts, unlike the statutes governing practice before the Federal Communications Commission and the Federal Power Commission,<sup>2/</sup> do not provide for intervention as of right, nor do they afford "adversely affected" or "aggrieved" third parties the right to appeal FTC Orders. Thus, the USWA has no right to intervene in Federal Trade Commission proceedings, nor does it have any right to appeal from adverse rulings of the Federal Trade Commission as an "adversely affected" or "aggrieved" party.

Section 11(b) of the Clayton Act, 15 U.S.C. §21(b), only permits intervention by a third party at the discretion of the Commission, and only upon a showing of good cause for such intervention:

"The Attorney General shall have the right to intervene and appear in said proceedings and any person may make application, and upon good cause shown may be allowed by the Commission or Board, to intervene and appear in said proceedings by counsel or in person." (Emphasis added).

<sup>2/</sup> As will be discussed, infra, this is a crucial distinction which renders most of the authorities cited by the USWA inapplicable.

**BEST COPY AVAILABLE**

from the original bound volume



Section 5(b) of the Federal Trade Commission Act, 15 U.S.C. § 45(b), similarly states:

"Any person, partnership or corporation may make application, and upon good cause shown may be allowed by the Commission to intervene and appear in said proceedings by counsel or in person. (Emphasis supplied)."

The permissive nature of intervention in FTC proceedings is set forth by the Commission in Section 3.14 of its Rules of Practice for Adjudicative Proceedings which provides, "The hearing examiner or the Commission may by order permit the intervention to such extent and upon such terms as are provided by law or as otherwise may be deemed proper." (Emphasis supplied).

The Commission itself has held on many occasions that the right to intervene in Commission proceedings is discretionary with the Commission and that permission to intervene should not be granted except upon good cause shown. In its opinion denying application for leave to intervene in Wilson Tobacco Board of Trade, Inc., Docket 6262, 52 F.T.C. 1148, 1149 (1956), the Commission stated:

"Under both the statute and the rule, however, intervention and the extent thereof is at the discretion of the Commission . . ."

Accord: The Yale & Towne Manufacturing Company, Docket 6232, 52 F.T.C. 1199 (1956); for examples of orders denying intervention and treating the same as permissive, see Berger Watch Company, Docket 6894, 56 F.T.C. 1655 (1959); Bernard Lowe Enterprises, Inc.,



Docket 7673, 59 F.T.C. 1485 (1961); Campbell Taggart Associated Bakeries, Inc., Order Denying Intervention But Granting Leave to file Amicus Curiae Memorandum, April 26, 1963, 62 F.T.C. 1498 (1963).

2. The Authorities Cited by the USWA Do Not Support Its Position in This Proceeding.

The USWA cites no Federal Trade Commission precedent in support of its motion to intervene as a party supporting the complaint. It relies primarily on cases in which affected members of the public were allowed to intervene in or to appeal from administrative proceedings involving the Federal Communications Commission and the Federal Power Commission -- agencies which are engaged in public utility forms of regulation and whose organic statutes expressly permit interested or "aggrieved" persons to intervene or to appeal from adverse administrative decisions.

In the United Church of Christ case,<sup>3/</sup> the Court of Appeals based its decision on the language of the Federal Communications Act, granting the right of intervention in agency proceedings to any "party in interest." Section 309(e) states:

---

<sup>3/</sup> United Church of Christ v. F.C.C., 359 F.2d 994 (D.C. Cir. 1966).

"When the Commission has so designated an application for hearing the parties in interest, if any, who are not notified by the Commission of such action may acquire the status of a party to the proceeding thereon by filing a petition for intervention showing the basis for their interest . . ." (Emphasis added) (47 U.S.C. §309).

In that case two individuals and the United Church of Christ, as members of the listening public, had sought to intervene as "parties in interest" in license renewal proceedings pending before the FCC. The agency denied intervention on the grounds that members of the listening public had no direct economic or other specific interest in renewal of a television station license, and that, accordingly, they were not "parties in interest" within the meaning of §309(a) of the Federal Communications Act. The Court reversed holding that they were "parties in interest" <sup>4/</sup> within the meaning of the intervention provision.

---

<sup>4/</sup> The other Federal Communications Commission cases cited by USWA are equally inapposite here. F.C.C. v. Sander & Brothers Radio Station, 309 U.S. 470 (1940) involved the right of a broadcaster to appeal from an order of the F.C.C. granting a license application to another broadcaster even though economic injury was not an issue in the F.C.C.'s determination to grant or withhold a license. The Court held that the broadcaster had that right by virtue of Section 402(b) of the Federal Communications Act, 47 U.S.C. §402(b), as a "person aggrieved or whose interests are adversely affected. . . ." The Federal Trade Commission Act contains no such provision, and it specifically limits the right of review to parties subject to orders to cease and desist. Scripps-Howard Radio v. F.C.C., 316 U.S. 4 (1942) involved only the issue of whether the Court of Appeals could stay an order of the F.C.C. granting a license application pending appeal of the F.C.C.'s decision by an aggrieved party. The Supreme Court's decision holding that the Court of Appeals had power to issue such stay orders does not appear to support USWA's motion for intervention

**BEST COPY AVAILABLE**

from the original bound volume

Similarly, the Scenic Hudson case involving the Federal Power Commission does not support the USWA's motion for intervention.<sup>5/</sup> In that case, an unincorporated association consisting of a number of non-profit, conservationist organizations and certain affected towns in New York State petitioned the Court of Appeals to set aside an order of the FPC granting a license to a public utility to construct a pumped storage hydroelectric project on the west side of the Hudson River at Storm King Mountain in Cornwall, New York. The FPC opposed the review petition contending that petitioners were not "aggrieved" persons within the meaning of §313(b) of the Federal Power Act which states:

"(b) any party to a proceeding under this chapter aggrieved by an order issued by the Commission in such proceeding may obtain a review of such order in the United States Court of Appeals for any Circuit wherein the licensee or public utility to which the order relates is located . . ."  
(16 U.S.C. §825(1)(b)).

The Court, however, set aside the order and found that the Federal Power Act required the Commission to consider as a

---

<sup>5/</sup> Scenic Hudson Preservation Conference v. F.P.C., 354 F.2d 608 (2nd Cir. 1965).

factor in granting such a license "recreational purposes" of waterway development. Accordingly, it held that parties asserting an interest in that factor were "aggrieved" within the meaning of the review provisions provided by the Federal Power Act.

While noting that the Federal Power Act did not create any absolute right of intervention,<sup>6/</sup> the Court noted that in the proceedings below the Federal Power Commission had not denied petitioner's right to file an application for a rehearing under Section 313(a) of the Federal Power Act even though that Section speaks in terms of "aggrieved parties."

The Scenic Hudson case, therefore, does not support the USWA's motion for intervention for two reasons. First, the Federal Power Act, unlike the FTC Act, contains a specific provision granting the right of review of agency action to "aggrieved parties." Secondly, the Court noted that the Federal Power Commission had in effect granted the petitioners a right to intervene in the proceedings below by permitting them to file an application

---

<sup>6/</sup> Section 308(a), 16 U.S.C. §825(g)(a).

for a rehearing.<sup>7/</sup>

The Citizens Committee case cited by the USWA is also inapposite.<sup>8/</sup> The Citizens Committee sought and obtained a Federal District Court ruling that a permit issued by the United States Army Corps of Engineers authorizing the dredging and filling of the Hudson River in connection with the proposed construction of the Hudson River Expressway was void since the Corps had not secured the consent of Congress and the approval of the Secretary of Transportation before issuing the permit, and an injunction prohibiting the issuance of any future permits in the absence of Congressional consent and approval of the Secretary of Transportation. On appeal by the defendants, the Second Circuit held that the District Court had jurisdiction over the subject matter of the actions by virtue of the Administrative

---

<sup>7/</sup> In this respect, the case of Associated Industries Inc. v. Ickes, 134 F.2d 694 (2nd Circuit 1943) is also distinguishable. There an organization representing consumers of coal sought review of an order issued by the Secretary of Interior establishing minimum prices of coal. The organization's petition for review was opposed on the grounds that it was not an "aggrieved party." In holding that the organization had standing to maintain the appeal, the court noted that the organization had fully participated in the proceedings below and that it had been fully recognized by all concerned as a party representing consumers. 134 F.2d at 699.

<sup>8/</sup> Citizens Committee for the Hudson Valley v. Volpe, \_\_\_\_\_ F.2d \_\_\_\_\_ (2nd Cir. 1970).

Procedure Act and that the plaintiffs had standing to seek review of agency action in Federal court under the authority of the same statute.

The Court determined the questions of jurisdiction and standing under the Administrative Procedure Act because the Rivers and Harbors Act contained no provision for judicial review, nor did it include specific procedures for appeal of the Army's decision. As there was nothing in the Rivers and Harbors Act which precluded judicial review, nor was the action of the Army in issuing the permit committed to its discretion by law, the Administrative Procedure Act was held to confer jurisdiction on the District Court to protect by injunctive relief such rights as the plaintiffs may have standing to assert. The Court further held that plaintiffs were "aggrieved by agency action" within the meaning of the Act, 5 U.S.C. § 702, in that the interest they sought to protect -- the interest of the public in environmental resources -- was an interest created by statute, and that it had been adversely affected by the Army's issuance of the permit.

The cases discussed above all dealt with parties seeking to intervene in or to seek judicial review of agency action where the governing statute afforded such a right to any party "aggrieved" or "adversely affected".



The Clayton Act (and the FTC Act) contains no provision granting "adversely affected" or "aggrieved" parties the right to intervene in Commission proceedings or to appeal Commission orders. In fact, unlike the statutes involved in the cases discussed above, the Clayton Act provides the right of review only to parties "required by an order of the Commission to cease and desist." This is consistent with the Congressional purpose to provide for intervention only at the discretion of the Commission upon a showing of good cause.<sup>9/</sup>

Secondly, the issuance of a Section 7 complaint pursuant to Section 11 of the Clayton Act, 15 U.S.C. § 21, is wholly within the discretion of the Commission, and no private party has the right to compel such action by the Commission. Similarly, the Commission has the exclusive power to terminate the proceedings initiated by its complaint, and no private party may object to its doing so. Thus, even if judicial review of Section 7 cases before the Commission was governed by a broader statutory provision,

---

9. In fact, the legislative history of the Federal Trade Commission Act indicates that a proposal to amend Section 5 thereof by allowing the person who originally complained to the Commission the right of review of an order arising out of his complaint was rejected by Congress. 51 Cong. Rec. 12,993, et seq. (1914). Professor Davis has noted that the FTC Act, which is identical in this respect to the Clayton Act, contains the "narrowest provision" for judicial review of any of the statutes "governing leading federal agencies". 3 Davis, Administrative Law, § 22.03 at 214



such as that in the Administrative Procedure Act, 5 U.S.C. §702, the USWA would be unable to secure review of an order dismissing the complaint, because such an order is "agency action . . . by law committed to agency discretion."

In addition, there is an important difference between FTC adjudicative proceedings, which may result in cease-and-desist orders, and FCC, FPC or other quasi-legislative proceedings involving the grant or denial of construction permits, station licenses or the renewal thereof. The latter proceedings are not usually adversary in nature, while FTC adjudicative proceedings, on the other hand, are adversary in nature, and counsel supporting the complaint present the case in support of the charges which are made in the complaint against the respondent. The FTC itself acts in a judicial role, ultimately determining whether the charges have been sustained.

Licensing proceedings -- whether before the FCC, FPC or the Corps of Engineers -- do not have these safeguards of the public interest. Instead of having staff counsel prosecuting a matter and constituting one side of an adversary proceeding, there is simply a private party seeking a grant or renewal of an application. If third parties were not permitted to intervene

in such proceedings, the agency, on the basis solely of self-serving representations of an applicant, might grant an application contrary to the public interest, convenience and necessity. These dangers are not present in FTC proceedings because of their adversary nature.

3. USWA's Motion To Intervene Fails To Show Good Cause Why It Should Be Permitted To Intervene As A Party.

A. The Motion Is Untimely

The untimeliness of USWA's motion to intervene alone is a sufficient ground to warrant its denial. The complaint in this proceeding was filed on August 5, 1968, and the record was closed for the reception of evidence on June 11, 1969, nearly one year ago. Even though the USWA was fully aware of the Peabody acquisition and the ensuing litigation -- indeed the USWA admits that its President wrote to the Commission as early as January 9, 1968, urging that a complaint be issued -- at no time while the case was being tried before the Hearing Examiner did the USWA seek to intervene for the purpose of offering material in the public interest. If the USWA had anything to contribute by way of evidence or argument, it should have sought to intervene earlier during the hearings.

B. The Public Interest Is Being Adequately Represented By the Parties in This Litigation.

USWA's claims that it must be allowed to intervene to assert the "interest of the public" in securing low-cost electricity and in preserving full and free competition. While the USWA pays lip service to the proposition that counsel supporting the complaint and the Commission itself are dedicated to advancing the public interest, it asserts that this does not bar a responsible private "representative of the public" from intervening (Motion to Intervene at 4).

As previously noted, the authorities cited by USWA deal primarily with such special interests as the interests of the listening public in the scope and quality of television service, the interest of the public in the "recreational purposes" of waterway development, and the interest of the public in preserving environmental resources.<sup>10/</sup> The interest claimed here -- the preservation of full and free competition -- is the responsibility of the Department of Justice and the Federal Trade Commission, the agencies charged by Congress with enforcing Section 7 of the Clayton Act. Unlike the cases cited by the USWA -- where the interests found to exist could not adequately be protected

---

<sup>10/</sup> See the United Church of Christ, Scenic Hudson and Citizens Committee cases discussed earlier at pp. 7-13.

without intervention -- the interest in preserving full and free competition is adequately represented here by counsel supporting the complaint.<sup>11/</sup>

The Commission itself, believing that its organic statute and procedures adequately represent and protect the public interest, has not been disposed to allow private persons<sup>12/</sup> to intervene as parties in litigation before it.

---

<sup>11/</sup> The claimed interest of the USWA in the price of electricity is, of course, merely a part of the public interest in preserving competition.

<sup>12/</sup> A review of the cases discloses that motions to intervene in Commission proceedings are not looked upon with favor. See Grand Caillou Packing Co., Inc., FTC Dkt. 7887 (Ruling by Hearing Examiner, November 8, 1962); Wilson Tobacco Board of Trade, Inc., 52 F.T.C. 1148 (1956); Standard Sewing Equipment Corporation, FTC Dkt. 4888, 4 Ad. L 2d. 382 (1954); Max Factor & Co., FTC Dkt. 7717 (Ruling by Hearing Examiner, May 11, 1960); Groveton Paper Co., FTC Dkt. 6592 (Ruling by Hearing Examiner, October 4, 1956); Yale & Towne Manufacturing Co., 52 F.T.C. 1199 (1956); Berger Watch Co., 56 F.T.C. 1655 (1959); and L.G. Balfour Company, et al., FTC Dkt. 8435 (Interlocutory Order Denying Motion to Intervene, December 16, 1966).

In denying a motion to intervene, even though unopposed by complaint counsel, in Wilson Tobacco Board of Trade, Inc., 52 F.T.C. at 1151, the Commission said: "The Commission acts only in the public interest, any protection afforded private persons being only incidental, and it must be ever vigilant against the possibility of its processes being used to further the private interests of any party. . . ." The practice of the Commission has been to deny motions to intervene in the absence of a specific and proper showing that protection of the public interest requires intervention.<sup>13/</sup>

---

<sup>13/</sup> Where intervention has been permitted by the Commission, the intervenor was in most instances a public body or entity, such as a state. See Florida Citrus Mutual, FTC Dkt. 6074 (Commission Order of February 12, 1953 allowing State of Florida to intervene); Standard Oil Company of Indiana, FTC Dkt. 7567 (Commission Orders of October 31, 1962 allowing State of Minnesota and December 17, 1962 allowing State of Wisconsin to intervene); and Soap Lake Products Corp., 33 F.T.C. 999 (1941) (Commission Order Reopening Proceeding Upon Petition by the State of Washington Appearing as Amicus Curiae).

C. The USWA's Attempt To Argue Matters  
of Labor Relations Policy in This  
Proceeding Is Inappropriate

The USWA's claim that this acquisition may result in a lessened sense of responsibility by Kennecott for the welfare of its copper employees is totally without foundation in fact. There is no evidence whatsoever that Kennecott's attitude towards its copper employees is any different today than it was before the acquisition, or that it will be any different in the future. In any event, the USWA's assertions on these issues have no place in this proceeding.

It is clear that the USWA's real interest in intervention is to urge its views of where the public interest lies with respect to certain labor relations questions. But this is not an appropriate forum for the formulation of national policy in the area of labor relations or for the adjudication of grievances such as that asserted by the USWA. It would be unreasonably burdensome to require respondent to answer in this proceeding the USWA's sweeping assertions, not based on the record, about the relative strength of contending parties in labor negotiations in the copper industry and where the public interest lies with respect to such issues.

CONCLUSION

The motion to intervene by USWA fails to establish the good cause required by Section 11(b) of the Clayton Act and accordingly should be denied by the Commission. The USWA is a labor union, the primary purpose of which is to act as a collective bargaining agent for its members; it is not an organization formed to advance the interests of consumers of electricity or to secure the enforcement of the Clayton Act. To permit the USWA to become a party to this proceeding at this late stage with all of the rights attendant thereon (i.e., notice, service of briefs and other pleadings, replies, etc.) will only have the effect of unnecessarily complicating and prolonging this proceeding.

Moreover, the argument sections of the USWA's brief merely repeat in slightly different language the arguments made by complaint counsel in their two briefs before the Hearing Examiner and their 119-page brief to the Commission. Nothing of substance is added by the USWA brief. Section II of the brief (pp. 27-30) makes arguments based on "financial" and "labor relations" cross-subsidization which have absolutely no basis, either in the record evidence or otherwise.



In special circumstances, the Commission in the past has denied motions to intervene but granted the movants permission to file an amicus curiae memorandum. (See L. G. Balfour Company, Dkt. No. 8435 (December 16, 1966); Campbell Taggart Associated Bakeries, Inc., Dkt. No. 7938, 62 FTC Reports 1494 at 1498 (1963)). This procedure permits an outside organization or person to submit his views without the necessity of making it a formal party or participant in the proceedings. In this case, respondent submits that the brief accompanying the motion to intervene does not even warrant the granting of permission to be filed as an amicus curiae memorandum, since it contains mostly information and argument irrelevant to the issues in this proceeding, but such permission is clearly the most to which the USWA is entitled.

Respectfully submitted,

SULLIVAN & CROMWELL

By Arthur H. Deane  
(A Member of the Firm)

48 Wall Street,  
New York, New York 10005.

- 47 -

- 22 -

HOWREY, SIMON, BAKER & MURCHISON

By John Bodner Jr.  
(A Member of the Firm)

1707 H Street, N.W.,  
Washington, D. C. 20006.

Attorneys for Respondent  
KENNECOTT COPPER CORPORATION

Roy H. Steyer,  
John Bodner, Jr.,  
John L. Warden,  
Francis A. O'Brien,

Of Counsel.

June 1, 1970

UNITED STATES OF AMERICA  
BEFORE FEDERAL TRADE COMMISSION

In the Matter of  
KENNECOTT COPPER CORPORATION,  
a corporation.

Docket No. 8765

OPPOSITION BY RESPONDENT TO  
RENEWED MOTION TO INTERVENE  
OF UNITED STEELWORKERS OF  
AMERICA, AFL-CIO

Respondent Kennecott Copper Corporation ("Kennecott") opposes the renewed motion to intervene of the United Steelworkers of America, AFL-CIO ("USWA") served upon Kennecott on August 10, 1970 for the reasons it opposed USWA's previous motion denied by the Commission on June 15, 1970. The present motion is without legal or factual basis, is belated, and advances no grounds for intervention other than those already considered and rejected by the Commission. Moreover, there is no need for USWA to participate in oral argument since its views have been previously communicated to the Commission by the brief filed by USWA and accepted by the Commission. In support of its opposition to this motion, Kennecott specifically shows:

1. USWA originally moved to intervene as a party in support of the complaint by motion served on May 21, 1970. In that motion, USWA set forth various grounds which allegedly entitled it to intervene. Respondent filed its opposition to this motion on June 1, 1970, showing clearly the insufficiency of USWA's position.

2. On June 15, 1970, the Commission entered its order receiving the brief filed by USWA, and otherwise denying the motion to intervene without prejudice.

3. All of the grounds urged in USWA's motion were also advanced in its original motion, and no new argument is presented. Consequently, the Commission, having already considered this question, should adhere to its previous position.

4. In any event, the argument made by USWA is without merit. We have shown in our previous opposition that under the applicable statutes (15 U.S.C. § 21(b); 15 U.S.C. § 45(b)), the Commission's Rules of Practice (Section 3.14), and pertinent Commission authorities, USWA has no "legal right"

to intervene in Commission proceedings. Intervention is allowed only in the discretion of the Commission upon a showing of "good cause," and as pointed out in our previous opposition, USWA has failed to establish such "good cause" in this case. The Supreme Court's recent decisions in Association of Data Processing Service Organizations, Inc. v. Camp, 397 U.S. 150 (1970), and Barlow v. Collins, 397 U.S. 159 (1970), both dealt with the "standing" of parties directly affected by affirmative government regulatory action to obtain judicial review of such action under the Administrative Procedure Act, 5 U.S.C. § 702. Neither case dealt directly with the question of intervention in an administrative judicial proceeding, and neither construed a judicial review provision similar to that of the Clayton Act, 15 U.S.C. § 21(c). Consequently, they are of no assistance to USWA in this proceeding.

5. Moreover, even if USWA were allowed to intervene in this proceeding, it would have no standing to obtain judicial review of a Commission decision favorable to Kennecott. The Clayton Act provides for a right of review only to parties

"required by such order of the commission . . . to cease and desist." 15 U.S.C. § 21(c). If the Commission upholds the Examiner's dismissal below, no order to cease and desist will issue. Thus, there will be nothing subject to judicial review within the meaning of the Clayton Act.

While this provision of the Clayton Act is dispositive of USWA's claim of standing to appeal a Commission decision favorable to Kennecott, it is equally clear that USWA's reliance on the judicial review provision of the Administrative Procedure Act, 5 U.S.C. § 702, is misplaced. (Renewed Motion To Intervene, p. 4). Dismissal of this complaint by the Commission will clearly be "agency action . . . by law committed to agency discretion," and, as noted, the Clayton Act precludes judicial review to all persons except those "required by such order of the commission . . . to cease and desist."

Unlike the cases cited by USWA,<sup>1/</sup> the issuance of a Section 7 complaint pursuant to Section 11 of the Clayton Act, 15 U.S.C. § 21, is wholly within the discretion of the Commission, and no private party has the right to compel

---

<sup>1/</sup> All of the cases cited by USWA in its present and previous motions have no application here, since none of them involved administrative adjudications, initiation and termination of which are by law committed to agency discretion; they all concerned affirmative agency action of a legislative nature, such as the granting of a license or permit, not committed by law solely to the discretion of the agency.



such action by the Commission. Similarly, the Commission has the exclusive power to terminate the proceedings initiated by the complaint, and no private party may object to its doing so. Thus, even if judicial review of Section 7 cases before the Commission were governed by a broader statutory provision, such as that in the Administrative Procedure Act, 5 U.S.C. § 702, the USWA would be unable to secure review of an order dismissing the complaint, because such an order is "agency action . . . by law committed to agency discretion."

Secondly, the Clayton Act (and the F.T.C. Act) contains no provisions granting "adversely affected" or "aggrieved" parties the right to seek judicial review of Commission orders, nor is it silent with respect to judicial review.<sup>2/</sup> Section 11(c) of the Clayton Act, 15 U.S.C. § 21(c), provides for a right of review only to parties "required by such order of the commission . . . to cease and desist." No right to seek judicial review is conferred upon any other party, and

---

<sup>2/</sup> In the cases cited by USWA the governing statutes either afforded a right of judicial review to any party "aggrieved" or "adversely affected" by agency action or were silent in this regard in which case the court applied the broader review provisions of the Administrative Procedure Act. Here the applicable statute (15 U.S.C. § 21(c)) provides for the right of review to a specific class of persons, i.e. those "required by such order of the commission . . . to cease and desist," thereby precluding the right of review to all other classes of persons.

the legislative history of the Clayton and F.T.C. Acts confirms that this was the intent of Congress.<sup>3/</sup>

6. It is clear, as we have demonstrated in our previous opposition, that USWA will suffer no legal wrong if the complaint herein is dismissed, nor will it be "adversely affected or aggrieved" by such a dismissal. The complaint in this action alleges that respondent has violated Section 7 of the Clayton Act by making an acquisition alleged to have caused a probable substantial lessening of competition in the production and sale of coal. Neither the USWA nor its members has any interest in competition in the coal business distinct

---

<sup>3/</sup> In Senate debate of the Federal Trade Commission Act, it was proposed on two occasions to amend Section 5 to allow the person who originally complained to the Commission to obtain judicial review of any action by the Commission dismissing his complaint. 63d Cong., 2d Sess. (1914), 51 Cong. Rec. 12993-94, 13315. This amendment was rejected by the Senate, 63d Cong., 2d Sess. (1914), 51 Cong. Rec. 13315-18, and when a similar amendment to the Clayton Act came on for debate in the Senate, it was immediately replaced by an amendment providing for the more narrow review contained in the F.T.C. Act. 63d Cong., 2d Sess. (1914), 51 Cong. Rec. 14223-24.

from that of the public at large, and it is exactly that interest which is being represented by counsel supporting the complaint. This is an inappropriate forum, indeed this Commission is an inappropriate agency, to consider complex issues of labor relations which lie at the root of USWA's interest in these proceedings and which are admittedly "not subject to correction by the Commission" (Motion . . . To Intervene, dated May 20, 1970, p. 5).

#### CONCLUSION

Participation by USWA in the oral argument on complaint counsel's appeal to the Commission will achieve nothing other than complication of the proceeding and the burdening of both respondent's counsel and complaint counsel, as well as the Commission, by the injection of irrelevant or repetitive argument. USWA's views as amicus curiae are already before the Commission in the form of its brief, and the Commission, like the Supreme Court,<sup>4/</sup> should not look with favor upon applications by counsel for amicus curiae to participate in oral argument. Further, USWA has no standing to seek judicial

---

<sup>4/</sup> See Rule 44(7), Rules of Supreme Court of the United States, effective October 2, 1967.

review of the Commission's decision, whether or not USWA is permitted to intervene. Accordingly, USWA's renewed motion to intervene should once again be denied.

Respectfully submitted,

SULLIVAN & CROMWELL

By Arthur H. Dean w.s.  
(A Member of the Firm)

48 Wall Street,  
New York, New York 10005.

HOWREY, SIMON, BAKER & MURCHISON

By William Simon  
(A Member of the Firm)

1707 H Street, N.W.  
Washington, D. C. 20006.

Attorneys for Respondent  
KENNECOTT COPPER CORPORATION

Roy H. Steyer,  
John Bodner, Jr.,  
John L. Warden,  
Francis A. O'Brien,

Of Counsel.

August 20, 1970

UNITED STATES OF AMERICA  
BEFORE FEDERAL TRADE COMMISSION



In the Matter of  
KENNECOTT COPPER CORPORATION,  
a corporation.

DOCKET NO. 8765.

OPPOSITION BY COMPLAINT COUNSEL  
TO RENEWED MOTION TO INTERVENE  
OF UNITED STEELWORKERS OF AMERICA

Complaint counsel oppose the renewed motion of the USWA to intervene in this action. In doing so, we generally subscribe to the rationale of the opposition being filed today by respondent, Kennecott Copper Corporation.

Complaint counsel took no position on the USWA's original motion to intervene as the arguments, pro and con, were ably set forth in the briefs filed by the movant and the respondent. The Commission denied the prior motion while permitting the filing of an amicus brief by USWA.

The "renewed" motion provides no additional justification for intervention; it only adds a claim to participate in oral argument.

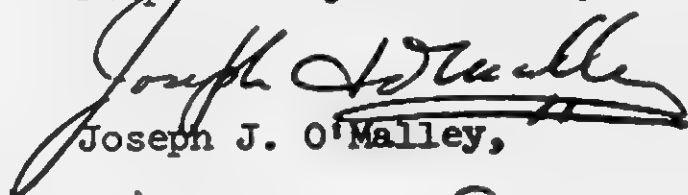
There are two well-defined sides to this case. As respondent's brief in opposition to this renewed motion properly notes, USWA has no interest in this case that is distinct from the public interest represented by complaint counsel except, perhaps, in the area of labor disputes. As to the latter, even assuming the propriety of the Commission's burdening itself with such considerations, the request for intervention is too late. This case was in litigation for over a year. Hearings were detailed, extensive and expensive. USWA, which admittedly was aware of the hearings, made no move to intervene or to call to the attention of trial counsel any of those factors it now deems important enough to justify intervention.

There is no fact in the record relating to the USWA. No attempt was made to present any facts or to appear as a party or as a witness. USWA's present motion has nothing to do with the issues of this case -- did the acquisition of Peabody by Kennecott create the probability of substantially lessening competition in the coal industry.

There is no indication in movant's papers that anything will be added to the oral argument that has not already appeared in its brief. The balkanization of oral argument by intervention of a party with a second-hand knowledge of the record, at best, places an unfair burden upon both complaint counsel and the respondent.

As the Commission has decided this matter once; as no new justification has been advanced by the USWA for the reversal of that decision; and as intervention at this point would serve no public purpose and would unnecessarily encumber the parties; and for those reasons otherwise set forth in this opposition and in respondent's brief, complaint counsel join with respondent in opposition to the renewal motion.

Respectfully submitted,

  
Joseph J. O'Malley,



Wilbur W. Sacra,  
Counsel Supporting  
the Complaint.



UNITED STATES OF AMERICA  
BEFORE FEDERAL TRADE COMMISSION

In the Matter of  
KENNECOTT COPPER CORPORATION,  
a corporation.

Docket No. 8765

MOTION FOR RECONSIDERATION

Respondent Kennecott Copper Corporation, by its attorneys, requests the Commission to reconsider its Order dated August 28, 1970, allowing United Steelworkers of America, AFL-CIO ("USWA") to present 45 minutes of oral argument. In support of this motion, respondent shows:

1. USWA first moved to intervene as a party in support of the complaint by motion served on May 21, 1970. Respondent opposed this motion on June 1, 1970, showing the insufficiency of USWA's position.

2. On June 15, 1970, the Commission entered its Order receiving the brief filed by USWA, but otherwise denying the motion to intervene without prejudice.

3. On August 10, 1970, USWA filed a renewed motion to intervene, specifically requesting therein permission to participate in oral argument. On August 20, 1970, respondent

and complaint counsel filed separate oppositions to said motion.

4. On August 28, 1970, the Commission issued an Order granting USWA leave to present oral argument, but denied the motion in all other respects.

5. The United States Constitution, the Administrative Procedure Act, and the Commission's own Rules of Practice require that a decision adjudicating the legality of an acquisition alleged to be in violation of Section 7 be based solely on the evidence of record. Though fully on notice of these proceedings, at no time did USWA participate or offer to participate (see complaint counsel's opposition to USWA's renewed motion to intervene, dated August 20, 1970) in the evidentiary hearings in this matter. The brief of USWA, previously accepted by the Commission over respondent's objection, argues policies and facts dehors the record in this proceeding, and undoubtedly its oral argument will similarly include extra-record facts and arguments.

6. USWA's stated purposes in seeking to participate in this proceeding -- in addition to attempting to arrogate to itself the public responsibility reposed in complaint counsel -- are to address to the Commission arguments with respect to

"evils" in the area of labor relations, which USWA itself admits "are not subject to correction by the Commission" (Motion to Intervene served on May 21, 1970), and somehow to gain the right to seek judicial review of a Commission decision favorable to respondent. We agree with USWA that its complaint of alleged "evils" in the labor relations area has no place in this proceeding, and we have previously shown that USWA has no right to seek judicial review.

7. USWA does not represent employees in the coal industry. Nor does it have any special knowledge about the competitive conditions of the coal industry which would be of assistance to the Commission. Indeed, USWA has no specific interest in the coal industry other than that of members of the public at large. In consequence, USWA cannot contribute anything to the Commission's understanding of the legal or factual issues presented by this case.

8. In the circumstances, USWA's participation in the oral argument, which complaint counsel have aptly termed a "balkanization" of the oral argument (Complaint Counsel's Opposition to USWA's Renewed Motion to Intervene, dated

August 20, 1970), serves no useful purpose and can only be disruptive of orderly procedure. Moreover, to require respondent to answer arguments and contentions which have no basis in the record in this case is contrary to all the requirements of due process and a fair hearing. Therefore, the Commission's Order allowing USWA to present oral argument in support of the complaint results in fundamental unfairness and undue prejudice to respondent and denies respondent a fair hearing in this proceeding.

9. Finally, Commissioner Mary Gardiner Jones, whom respondent has challenged as having prejudged significant issues in this proceeding, participated in consideration of USWA's original and renewed motions and voted in this matter to allow USWA to intervene in this proceeding for all purposes. Her position may well have influenced the Commission's decision to allow USWA to present oral argument, and it compounds the prejudice and denial of a fair hearing to respondent.

For all of the above reasons, it is respectfully requested that the Commission reconsider its Order of August 28, 1970, and withdraw the permission granted USWA to present oral

argument.

Respectfully submitted,

SULLIVAN & CROMWELL

By Arthur H. Dean F.B.  
(A Member of the Firm)

48 Wall Street  
New York, New York 10005

HOWREY, SIMON, BAKER & MURCHISON

By William Simon F.B.  
(A Member of the Firm)

1707 H Street, N.W.  
Washington, D. C. 20006

Attorneys for Respondent  
KENNECOTT COPPER CORPORATION

Roy H. Steyer,  
John Bodner, Jr.,  
John L. Warden,  
Francis A. O'Brien,

Of Counsel.

September 10, 1970

UNITED STATES OF AMERICA  
BEFORE FEDERAL TRADE COMMISSION

\_\_\_\_\_  
In the Matter of  
KENNECOTT CORPORATION,  
a corporation.  
\_\_\_\_\_

)  
)  
)  
)  
)  
)  
)  
Docket No. 8765

OPPOSITION TO MOTION FOR RECONSIDERATION

United Steelworkers of America, AFL-CIO ("USWA") opposes the motion of Kennecott Copper Corporation ("Kennecott") for reconsideration of the Commission's allowance to USWA of an opportunity to present oral argument.

Kennecott is peddling the same shopworn arguments which it advanced in opposing USWA's original request, and which the Commission rejected when it decided to allow USWA to present oral argument.

Kennecott's principal claim is that one of "USWA's stated purposes in seeking to participate in this proceeding ...[is] to address to the Commission arguments with respect to 'evils' in the area of labor relations ..."(Motion for Reconsideration, pages 2-3). Building upon this assertion, Kennecott contends



that "to require respondent to answer arguments and contentions which have no basis in the record in this case is contrary to all the requirements of due process and a fair hearing" (Id., page 4).

Putting it politely, this is hogwash. USWA has never stated an intention to address arguments to the Commission relating to "evils" in labor relations, nor has it done so; indeed, as Kennecott acknowledges, USWA has said that such evils are beyond the Commission's reach. In its motion to intervene, USWA stated that there are labor relations problems which flow from this acquisition, and that these problems in part account for USWA's desire to see the acquisition undone. We were careful to add, however, that our legal argument would be confined solely to the antitrust considerations which are within the Commission's province, and a review of our brief will disclose that we were faithful to that pledge.

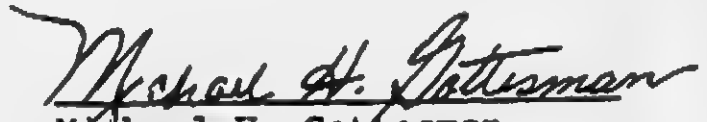
We believe the Commission violated our rights when it denied our motion to intervene, and we are instituting legal proceedings challenging that denial. The harm done by that

---

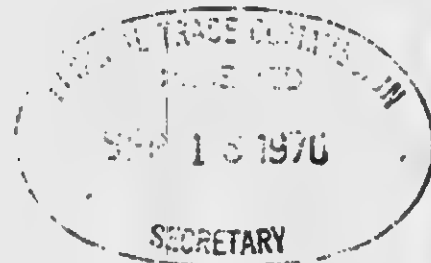
/ Kennecott's statement that USWA's brief "argued policies and facts dehors the record in this proceeding" (Id., page 2) is simply false, as is its conclusion that USWA's "oral argument will similarly include extra-record facts and arguments." (Ibid.)

denial would be greatly magnified if the Commission were not only to deny USWA party status, but to close its ears to USWA's arguments as well.

WHEREFORE, Kennecott's motion for reconsideration should be denied.

  
Michael H. Gottesman  
1001 Connecticut Avenue N.W.  
Washington, D. C. 20036  
Attorney for United Steel-  
workers of America, AFL-CIO

UNITED STATES OF AMERICA  
BEFORE FEDERAL TRADE COMMISSION



In the Matter of  
KENNECOTT COPPER CORPORATION,  
a corporation.

DOCKET NO. 8765.

MEMORANDUM OF COMPLAINT COUNSEL IN SUPPORT  
OF RESPONDENT'S MOTION FOR RECONSIDERATION

Complaint counsel support the motion for reconsideration filed by respondent, Kennecott Copper Corporation, on September 10, 1970 relating to the action of the Commission of August 28, 1970 granting United Steel Workers of America, AFL-CIO ("USWA") leave to present oral argument in this matter.

Complaint counsel's support of respondent's motion specifically excludes that portion of the aforesaid motion relating to the participation by Commissioner Mary Gardiner Jones in this matter.

The record in this case encompasses some 6,500 pages of testimony and approximately 4,000 pages of documentation. To the extent that it supports the complaint, this record was created by complaint counsel with no assistance of any sort from the USWA. The Commission, by its action of August 28, 1970, has granted USWA, with no more interest in this case than any other labor organization, citizens group or fraternal organization, the same amount of time for argument in support of the complaint as complaint counsel.

In its somewhat intemperate opposition to respondent's motion, USWA disclaimed any intention of interposing arguments relating to labor relations or any other matter outside of the antitrust implication of the subject acquisition. If this is to be taken literally, it appears to complaint counsel that such a disclaimer negates USWA's claim of a special interest in the outcome of this matter.

Under the circumstances, we have difficulty in understanding the real purpose behind this action by USWA. The complaint can hardly be supported more effectively by splitting the argument in its favor between counsel who are thoroughly familiar with the facts on record and counsel for an organization which has interposed itself at the eleventh hour on the basis of a second-hand reading of a record established by complaint counsel. We agree wholeheartedly with respondent that this type of split argument can only serve to confuse the issues before the Commission, and, to the extent that it does so, must in fact be contrary to the public interest

Complaint counsel remain firm in the belief that USWA should not be granted time for oral argument. However, if the Commission determines to confirm its prior decision upon the motion to intervene, it is suggested that any material or concept which USWA might be able to present, outside of those which have already been presented to the Commission in briefs and in the record by complaint counsel, should be capable of being discussed fully and succinctly in less than ten minutes.

The Commission has now granted 45 minutes to complaint counsel, 45 minutes to USWA and 45 minutes to respondent for presentation of oral argument. Complaint counsel does not know the substance of, nor are they responsible for, any legal theory or factual argument which may be presented by USWA. Indeed, it may well be that such arguments would be adverse to the concepts of the case as presented by complaint counsel. Accordingly, complaint counsel will in all probability require additional time to reply to the arguments of USWA as well as respondent. It is also possible that respondent will ask for an equivalent period of time.

Respectfully submitted,

*J. J. O'Malley*  
Joseph J. O'Malley,

*Wilbur W. Sacra*

Wilbur W. Sacra,  
Counsel Supporting the  
Complaint.

Recd 7/28/70

UNITED STATES OF AMERICA  
BEFORE FEDERAL TRADE COMMISSION

COMMISSIONERS:

Miles W. Kirkpatrick, Chairman  
Paul Rand Dixon  
Philip Elman  
Everette MacIntyre  
Mary Gardiner Jones

In the Matter of  
  
KENNECOTT COPPER CORPORATION,  
a corporation.

DOCKET NO. 8765

ORDER DENYING  
MOTION FOR  
RECONSIDERATION

This matter is before the Commission upon the motion filed September 10, 1970, by respondent for reconsideration of the Commission's Order issued August 28, 1970, which grants the renewed motion of United Steelworkers of America, AFL-CIO, (USWA) to participate in this proceeding to the extent of permitting such organization to appear and present oral argument. USWA on September 16, 1970, filed a statement opposing respondent's motion.

Respondent on June 1, 1970, filed a substantial brief in opposition to the original motion to intervene filed by USWA; and on August 20, 1970, it filed a further brief in opposition to the "renewed" motion to intervene. Thus, the Commission prior to its action was fully advised of respondent's position. The current motion presents substantially the same arguments on the merits previously made to the Commission, and offers no grounds to justify the reconsideration requested.

Respondent's only new contention is the allegation that the position of Commissioner Jones, whom respondent had previously sought to disqualify from participation in this case on the grounds of prejudgment, "may well have influenced the Commission's decision to allow USWA to present oral argument" compounding, it asserts "the prejudice and denial of a fair hearing to respondent." The Commission, on

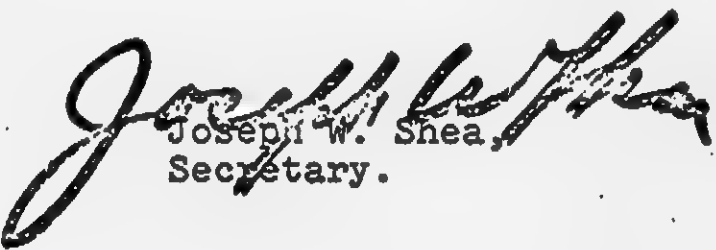
D. 8765

June 13, 1969, issued its Order denying respondent's motion to disqualify Commissioner Jones. Further argument at this time involving her participation is inappropriate. Accordingly,

IT IS ORDERED that respondent's motion for reconsideration filed September 10, 1970, be, and it hereby is, denied.

By the Commission, with Commissioners Elman and Jones not participating.

S E A L

  
Joseph W. Shea,  
Secretary.

ISSUED: September 25, 1970





UNITED STATES OF AMERICA  
BEFORE FEDERAL TRADE COMMISSION

In the Matter of  
KENNECOTT COPPER CORPORATION,  
a corporation.

Docket No. 8765

MOTION FOR EQUAL TIME TO  
PRESENT ORAL ARGUMENT

Respondent, Kennecott Copper Corporation, by its attorneys, hereby requests that it be granted time for oral argument equal to the total time granted by the Commission to counsel supporting the complaint and to United Steelworkers of America, AFL-CIO (USWA). Presently, counsel supporting the complaint and counsel for USWA each has 45 minutes, for a total of one and one-half hours to present oral argument in support of the complaint. In support of this motion, respondent shows:

1. By notice dated June 19, 1970, respondent was advised by the Commission that oral argument upon the appeal of counsel supporting the complaint from the Initial Decision of the Hearing Examiner had been set for Tuesday, October 27, 1970,

and that each side was allotted 45 minutes for oral argument.

2. On August 28, 1970, over the objection of respondent and complaint counsel, the Commission entered an Order granting USWA leave to present oral argument in support of the complaint, and allotted 45 minutes for its oral argument. Respondent's motion for reconsideration, supported by complaint counsel, was denied on September 25, 1970.

3. Thus, counsel supporting the complaint and counsel for USWA, under the present schedule, will each have 45 minutes within which to present oral argument in support of the complaint while respondent's counsel has been allotted only 45 minutes within which to present oral argument in opposition thereto.

4. In order to receive due process of law and a fair opportunity to be heard, it is fundamental that respondent be granted the same amount of time to present oral argument as that given to its opponents. While respondent may not find it necessary to utilize the entire amount of time requested, it is entitled as of right to equal time to present its position.

5. It is the practice of the Supreme Court to grant equal time for oral argument to both sides of a case. For example, if an amicus curiae is permitted to participate in oral argument and is allotted 20 minutes for this purpose, then the other side is likewise allotted an additional 20 minutes to present oral argument in the case. See, e.g., Daniel v. Paul, 394 U.S. 901 (1969).

Accordingly, for these reasons respondent respectfully requests that the Commission enter an order directing the Secretary to allot to respondent time for oral argument equal to the total time granted complaint counsel and USWA.

Respectfully submitted,

SULLIVAN & CROMWELL

By Arthur H. Dean Jr.  
(A Member of the Firm)  
48 Wall Street  
New York, New York 10005

Of Counsel:

Roy H. Steyer,  
John Bodner, Jr.,  
John L. Warden,  
Francis A. O'Brien.

HOWREY, SIMON, BAKER & MURCHISON

By John Bodner Jr.  
(A Member of the Firm)  
1707 H Street, Northwest  
Washington, D.C. 20006

Attorneys for Respondent  
KENNECOTT COPPER CORPORATION

September 29, 1970

UNITED STATES OF AMERICA  
BEFORE FEDERAL TRADE COMMISSION

COMMISSIONERS:

Miles W. Kirkpatrick, Chairman  
Paul Rand Dixon  
Philip Elman  
Everette MacIntyre  
Mary Gardiner Jones

In the Matter of  
  
KENNECOTT COPPER CORPORATION,  
a corporation.

DOCKET NO. 8765

ORDER ALLOCATING TIME  
FOR ORAL ARGUMENT

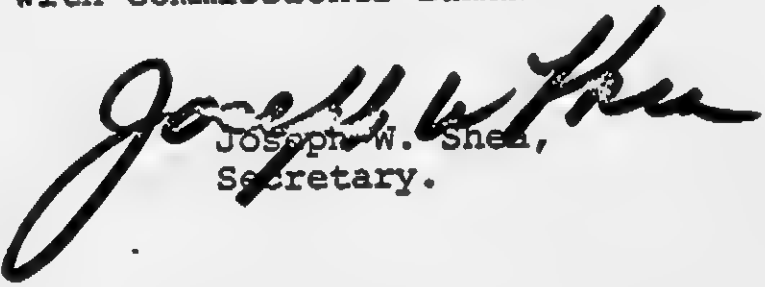
Respondent by motion filed September 29, 1970, having requested time for oral argument equal to the total time granted to complaint counsel and to United Steelworkers of America, AFL-CIO; and

The Commission having determined that respondent should be granted additional time and that in the circumstances the time allowed for oral argument should be reallocated:

IT IS ORDERED that the time granted for oral argument shall be as follows: complaint counsel, forty five (45) minutes; respondent, sixty (60) minutes; and United Steelworkers of America, AFL-CIO, thirty (30) minutes.

By the Commission, with Commissioner Elman not participating.

S E A L

  
Joseph W. Shea,  
Secretary.

ISSUED: October 2, 1970

Docket No. 8765

United Steelworkers of America, AFL-CIO (hereinafter "USWA") moves to intervene in this proceeding as a party supporting the complaint, pursuant to 15 U.S.C. § 21(b), in light of the standards enunciated by the Commission in its Opinion and Order of October 26, 1970, in Docket No. 8818 (In the Matter of Firestone Tire and Rubber Company --- hereinafter referred to as the "SOUP" opinion).

USWA previously filed motions on May 20, 1970, and August 10, 1970, seeking intervention, asserting that it was entitled to intervene as a matter of right. By orders of June 15, 1970, and August 28, 1970, the Commission denied USWA's motions to intervene but permitted USWA to submit a brief and to present oral argument. USWA has instituted legal proceedings -- which are now pending -- challenging the denial of its prior motions, and claiming that it was entitled to intervene as a matter of right.

Subsequent to the denials of USWA's prior motions, the Commission issued its SOUP opinion, declaring that in appropriate circumstances the Commission would grant intervention as a matter of discretion to private parties anxious to support Commission complaints. USWA believes that its intervention is warranted in light of the SOUP standards, and accordingly files its present motion. In doing so, USWA does not waive its prior claim that it is entitled to intervene as a matter of right.

In the SOUP opinion, the Commission stated:

" . . . [B]efore the Commission will allow intervention into its proceedings, it must be demonstrated that (1) the persons seeking such intervention desire to raise substantial issues of law or fact which would not otherwise be properly raised or argued, and (2) the issues thus raised are of sufficient importance and immediacy to warrant an additional expenditure of the Commission's limited resources on a necessarily longer and more complicated proceeding in that case, when considered in light of other important matters pending before the Commission. . . . [W]e would suggest the following additional factors which will generally be considered: the applicant's ability to contribute to the case; the Commission's need for expedition in the handling of the case; and the possible prejudice to the rights of original parties if intervention is allowed."

USWA's interest in this proceeding was set forth in its motion of May 20, 1970, which we incorporate herein by reference. And USWA's contribution to this proceeding thus far demonstrates that the SOUP standards are met. USWA briefed and argued a legal theory ("deep pockets") which, although alleged in the complaint (paragraph 30(f)),




has not been pressed by counsel supporting the complaint. We believe that USWA's presentation has been sufficiently important to warrant the Commission's expenditure of time and resources in receiving that presentation, that USWA has shown an ability to contribute to the case, that USWA's contribution cannot cause undue delay in the handling of the case, and that the rights of the original parties cannot be prejudiced by USWA's participation.

It remains for USWA to emphasize why it is making this motion at this time. As stated in USWA's prior motions, one of the reasons USWA sought intervention in this proceeding was to better assure USWA's standing to seek judicial review of the Commission's ultimate decision, in the event that that decision fails to order Kennecott Copper Corporation to divest itself of Peabody Coal Company. The Administrative Procedure Act authorizes any "person . . . adversely affected or aggrieved by agency action" to seek judicial review thereof. 5 U.S.C. § 702. We believe that USWA would be considered such a "person" even if its motion to intervene herein as a party were denied. However, this question is not wholly free from doubt. As noted in our original motion of May 20, 1970, there is no existing party who could seek judicial review of a Commission decision favoring Kennecott. USWA seeks to assure the availability of such judicial review by acquiring full-party status before the Commission, thereby eliminating a possible obstacle to its standing to seek review.

Since Kennecott has the right to challenge a Commission decision adverse to it, considerations of fair play dictate that those who seek the opposite result have the right to challenge a Commission decision favorable to Kennecott.

WHEREFORE, USWA prays that, under the standards enunciated in the SOUP opinion, it be permitted to intervene as a party supporting the complaint.

Respectfully submitted,

  
MICHAEL H. GOTTESMAN  
1000 Connecticut Ave., N.W.  
Washington, D. C. 20036

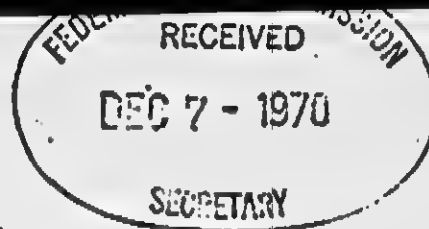
Of Counsel:

BERNARD KLEIMAN  
10 South LaSalle Street  
Chicago, Illinois 60603

Elliot Bredhoff  
George H. Cohen  
Bredhoff, Barr, Gottesman, Cohen & Peer  
1000 Connecticut Ave., N.W.  
Washington, D. C. 20036

Attorney for United Steelworkers  
of America, AFL-CIO

Rec'd  
File



UNITED STATES OF AMERICA  
BEFORE FEDERAL TRADE COMMISSION

In the Matter of  
KENNECOTT COPPER CORP.  
a corporation.

DOCKET NO. 8765

MEMORANDUM OF COMPLAINT COUNSEL IN  
OPPOSITION TO USWA MOTION TO INTERVENE

Complaint counsel oppose this third motion of the United Steelworkers to intervene in this proceeding. Although our position has been stated previously, the persistence of the Steelworkers counsel in this matter and the flagrant misrepresentation of a fact in support of its motion compels a reply. We shall compare, as did the movant, this situation to the SOUP opinion.

1. The Steelworkers raised no substantial issue of law or fact. The "deep pocket" theory upon which the movant relies for its "contribution" to this case was presented by complaint counsel to the extent that the facts in evidence supported such a theory. (E.g., CRB at 25)

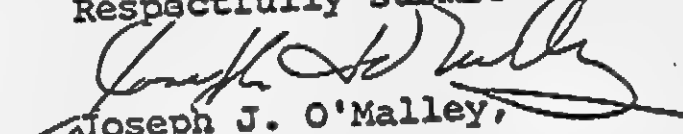
The movant had ample advance notice that this case was in litigation. It did not choose to insert itself into the proceedings until after all the facts were established in the record and after both parties had fully argued the case in proposed findings and briefs to the Examiner. The Steelworkers presented no evidence as to any fact and argued no point that had not been presented previously by complaint counsel in its proper perspective.

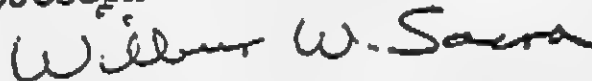
2. As the Steelworkers presented no new issue, the second factor noted in the SOUP opinion as quoted on page 2 of the motion is inapplicable.


3. Additional factors cited by the movant as justification for intervention are similarly inapplicable. There is nothing that the applicant can contribute to this case. The suggestion that the Commission permit a person with nothing more than a general interest in a given proceeding to intervene for the sole purpose of overturning an adverse Commission decision is without precedent and without legal basis, as is quite evident from the movant's failure to cite a single appropriate authority in this or its prior motions.

Indeed, if one strips the verbiage from the Steelworkers' motion, it does nothing more than tell the Commission that it may be incapable of performing its statutory duty to act in the public interest and that the Steelworkers will take up the banner if, in its opinion, the Commission should falter. Such a position is more than presumptuous; it strikes at the very heart of the justification for the existence of administrative agencies.

Respectfully submitted,

  
Joseph J. O'Malley,

  
Wilbur W. Sacra,

  
Larry D. Sharp,  
Counsel Supporting  
the Complaint.

December 7, 1970.

UNITED STATES OF AMERICA  
BEFORE FEDERAL TRADE COMMISSION



FTC  
file

In the Matter of  
KENNECOTT COPPER CORPORATION,  
a corporation.

Docket No. 8765

RESPONDENT'S OPPOSITION TO  
THIRD MOTION TO INTERVENE  
OF UNITED STEELWORKERS OF AMERICA

Respondent Kennecott Copper Corporation ("Kennecott") opposes the third motion to intervene of the United Steelworkers of America, AFL-CIO (the "USWA") served upon Kennecott on December 2, 1970. The USWA's third motion is entirely without merit and advances no ground for intervention which has not previously been considered and rejected by the Commission.

The USWA's original motion to intervene dated May 19, 1970, opposed by Kennecott on June 1, 1970, was denied by the Commission in its Order dated June 15, 1970.<sup>1/</sup> On August 10, 1970, USWA filed a renewed motion to intervene. This was again opposed by Kennecott and also by complaint counsel on August 20, 1970 and denied by the Commission in its Order dated August 28, 1970.

---

<sup>1/</sup> The original motion to intervene was made almost a year after the conclusion of the trial before the Hearing Examiner and over two months after the filing of the Initial Decision.

Although denying USWA's motions to intervene as a party supporting the complaint, the Commission, in the exercise of its discretion, accepted USWA's brief on the merits and allowed its counsel to present 30 minutes of oral argument in support of its position. Thus, USWA has been afforded a full and adequate opportunity to be heard on the issues which it believes are involved in this matter.

Nevertheless, on September 15, 1970, the USWA filed in the United States Court of Appeals for the District of Columbia a petition for review of the Commission's order of August 28, 1970 denying intervention. On the same date, the USWA filed a complaint in the United States District Court for the District of Columbia seeking a mandatory injunction requiring the Commission to allow it to intervene. The Commission, as well as Kennecott, has moved to dismiss the petition for review filed in the Court of Appeals.

The Commission's Memorandum in support of its motion in that Court shows clearly that the USWA is not entitled to the relief it seeks in this third effort to intervene before the Commission. The avowed purpose of USWA's intervention (p.3) is to "assure USWA's standing to seek judicial review of the Commission's



ultimate decision, in the event that that decision fails to order Kennecott Copper Corporation to divest itself of Peabody Coal Company." The Commission's Memorandum points out (pp. 6-9, 10-12) that neither it nor the courts have power to grant such relief.

The fact that the USWA has already been accorded a full opportunity to participate in the briefing and argument of the appeal in this case and can gain nothing more from being made a "party" is a conclusive reason why its current motion to intervene should be denied. The motion is, however, also erroneous in suggesting that the Commission's decision of October 26, 1970 in Firestone Tire and Rubber Company, Docket No. 8818, and the USWA's alleged "contribution to this proceeding" provide grounds for making it a "party" to this case.

Firestone dealt with a situation entirely different from that presented by the USWA's motion and, to the extent that it is applicable here, further indicates that the USWA's motion should be denied. And, despite the USWA's claims, it is clear that it has made no "contribution" to this proceeding that is responsive in any way to the detailed record to which the USWA made no effort to contribute and which it now simply seeks to avoid.

The USWA Does Not Come Within the Criteria  
for Intervention Established by Firestone

In Firestone, a case involving alleged false and deceptive advertising, the Commission dealt with a timely motion to intervene at the trial level. The group seeking to intervene wished to present evidence and legal argument in support of a contention that a novel provision, not contained in the proposed order attached to the complaint, should be included in the relief granted if the case should be determined adversely to the respondent.

The Commission stated generally that intervention should be permitted only if "(1) the persons seeking such intervention desire to raise substantial issues of law or fact which would not otherwise be properly raised or argued, and (2) the issues thus raised are of sufficient importance and immediacy to warrant an additional expenditure of the Commission's limited resources on a necessarily longer and more complicated proceeding in that case, when considered in light of other important matters pending before the Commission." The motion to intervene was granted because the Commission believed these criteria had been met in the particular case:

"... SOUP [the group seeking intervention] has raised the issue of the necessity for affirmative disclosure relief in a case that involves a public

safety danger, a category of cases in which such relief may be especially appropriate. See Campbell Soup, supra, at 21,423. Furthermore, this issue and this type of case is high on the list of our own priorities. The Commission believes that intervention in this case may contribute to a fuller appreciation of the need for stronger remedies generally in Commission cases. ..."

In marked contrast to the situation presented in Firestone, the USWA, although fully aware of the Commission's consideration of this matter at least six months prior to the filing of the complaint, did not seek to intervene at the trial level for the purpose of presenting evidence or argument with respect to any issue in the proceeding. Instead, the USWA sought intervention only at the appellate stage, and it received from the Commission permission to participate by filing a brief and presenting oral argument. Nothing in Firestone suggests that the USWA is entitled to anything more.

Specifically, nothing in Firestone suggests that, having been allowed to file a brief and to participate in oral argument on the appeal, the USWA should now be granted the status of a "party" so that it may -- as it sees the law -- seek judicial review of a Commission decision favorable to Kennecott. To the contrary, Firestone suggests that only unusual circumstances, clearly not present in this case, can justify intervention:

"The public would be ill-served by an agency whose proceedings were vulnerable to disruption and agonizing delay by means of the proliferation of parties and other participants. Furthermore, the need for public interest intervenors in FTC proceedings is substantially less than the need for such intervention in the proceedings of other agencies. Unlike some other agencies, the FTC has a built-in public interest prosecutor in all of its proceedings; our adjudications are truly adversarial, without intervention of any kind. Therefore, it is reasonable to require a substantial showing of special circumstances justifying intervention in a particular case."

The USWA has made no "substantial showing of special circumstances" justifying the entry of an order making it a "party" to this proceeding. The only reason advanced -- its desire, unsupported by statute or precedent, to seek judicial review -- certainly cannot suffice because the absence of judicial review of a dismissal by the Commission of its own complaint is a circumstance present in every case.

The USWA Has Made No Positive  
"Contribution" to This Proceeding

In the present posture of this proceeding, which has been briefed and argued before the Commission and is awaiting decision, no useful purpose could be served by making the USWA a "party" whatever its "contribution" to the proceeding might have been. Neither Firestone nor prior administrative and judicial decisions

provide any support for such a course of action. But, in view of the USWA's contention, which is contrary to fact, that it has made an important contribution to the briefing and argument of this case before the Commission, Kennecott believes the correct facts should be set forth.

The USWA states that its "contribution to this proceeding thus far demonstrates that the SOUP standards are met," because "USWA briefed and argued a legal theory ('deep pockets') which, although alleged in the complaint (paragraph 30(f)) has not been pressed by counsel supporting the complaint." (Motion, pp. 2-3).

The USWA is quite correct that complaint counsel stated on oral argument that they were not urging a "deep pocket" argument (Oral Argument 24) and that counsel for USWA did urge such a proposition (Oral Argument 25-26, 32-37). Far from aiding the Commission in determining the appeal, however, the USWA's advancement of this issue could only serve to mislead.

Complaint counsel frankly recognized that the record does not contain any substantial evidence in support of a deep pocket theory. Counsel for the USWA simply made up a set of facts contrary to the record to support such a theory, culminating in the assertion that the acquisition has given Peabody "three times the assets of any other company in the coal industry" (Oral

Argument 34, lines 20-21) and that, as a result, Peabody will be able to "double, triple, quadruple its market share of this industry" (Oral Argument 34-35).

These contentions are groundless and are contradicted by the record. Several basic facts about the structure of the coal industry, entirely ignored by the USWA, demonstrate the complete inapplicability of the deep pocket theory to this case. The identity, total assets and sales revenues of each of the 26 leading coal producers in the United States for the year 1967 are shown in the table at page 54 of the Initial Decision. As found by the Examiner (Initial Decision 196):

"Kennecott is far from the largest company engaged in the coal business. There were 5 companies producing steam coal in the United States in 1967 that had greater total sales (coal and noncoal), and 5 that had greater assets, than Kennecott and Peabody combined. Three companies--Gulf Oil, Union Carbide, and Continental Oil--had greater sales and greater assets than Kennecott and Peabody combined.

"Of the 10 leading steam coal producers, 4 are oil companies (Continental Oil, Occidental Petroleum, Standard Oil (Ohio), and Gulf Oil). Two of the 10 leading steam coal producers (Gulf and Continental) have total assets and annual sales revenues each exceeding \$2 billion (RX 170, supra, p. 54). Finally, Standard Oil (New Jersey), the world's largest industrial corporation in terms of assets, has become one of the country's largest owners of coal reserves and has entered the coal business by contracting to supply Commonwealth Edison commencing in 1970." (Footnotes omitted.)



As the Examiner also found (Initial Decision 62):

"[T]he sellers of competing fuels include many substantial and capable companies. Four of the 10 largest industrial corporations in the United States in terms of sales and assets, and 5 in terms of net income, are oil companies. Each of these companies--Standard Oil (New Jersey), Mobil Oil, Texaco, Gulf, and Standard Oil of California --has assets in excess of \$4.5 billion and annual income in excess of \$350 million. Eleven other oil companies are listed in the first 100 of 'Fortune's 500'. (CX-188; RX 168; RX 170 A-C; RX 171 A-B)."

There is marked contrast between the facts of this case and those of the cases which have applied the deep pocket theory. For example, in Clorox the acquiring firm had total sales more than 20 times as great as those of the largest firm in the industry and an advertising and sales promotion budget substantially larger than the combined total sales of the two leading firms. Procter & Gamble Co., 63 F.T.C. 1534, 1571-72 (1963), rev'd, 358 F.2d 74 (6th Cir. 1966), rev'd, 386 U.S. 568 (1967). Similar circumstances existed in General Foods Corp. [1965-1967 Transfer Binder], Trade Reg. Rep. ¶17,465 (F.T.C. 1966), aff'd, 386 F.2d 936 (3rd Cir. 1967), cert. denied, 391 U.S. 919 (1968) (acquiring company had annual sales over 30 times as great as entire industry); and Reynolds Metals Co., 56 F.T.C. 743, 768, 773 (1960), aff'd, 309 F.2d 223 (D.C. Cir. 1962) (acquiring company's annual sales over 200 times as great as entire industry).



Complaint counsel (unlike the USWA) were intimately involved in the making of the record of this case and were fully familiar with the above facts during the preparation of their proposed findings and briefs. In light of the record, and their obligations to the Commission, they quite properly refrained from urging the <sup>1/</sup> deep pocket theory upon the Commission.

#### Conclusion

No ground exists for granting the USWA's third motion to intervene, and no useful purpose would be served by

---

<sup>1/</sup> The USWA's current reliance on a theory wholly contradicted by the record belies the protestation in its Opposition to Motion for Reconsideration dated September 15, 1970 (page 2) that it is "hogwash" to suggest that it would be departing from the record.

making the USWA a "party" to this proceeding. The motion should be denied.

Respectfully submitted,

SULLIVAN & CROMWELL

By *Robert M. Sullivan*  
(A Member of the Firm)

48 Wall Street  
New York, New York 10005

HOWREY, SIMON, BAKER & MURCHISON

By *William J. Simon*  
(A Member of the Firm)

1707 H Street, Northwest  
Washington, D. C. 20006

Attorneys for Respondent  
KENNECOTT COPPER CORPORATION

Roy H. Steyer,  
John Bodner, Jr.,  
John L. Warden,  
Francis A. O'Brien,

Of Counsel.

December 7, 1970

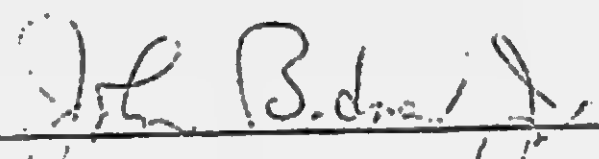
UNITED STATES OF AMERICA  
BEFORE FEDERAL TRADE COMMISSION

In the Matter of  
KENNECOTT COPPER CORPORATION,  
a corporation.

Docket No. 8765

CERTIFICATE OF SERVICE

I hereby certify that two copies of the "Respondent's  
Opposition to Third Motion to Intervene of United Steelworkers  
of America" were served today by hand delivery to: Michael H.  
Gottesman, Esq., Bredhoff, Gottesman & Cohen, 1001 Connecticut  
Avenue, N.W., Washington, D. C. 20036, attorney for United  
Steelworkers of America, AFL-CIO.

  
Howrey, Simon, Baker & Murchison  
1707 H Street, Northwest  
Washington, D. C. 20006

Attorneys for Respondent  
Kennecott Copper Corporation

December 7, 1970.

UNITED STATES OF AMERICA  
BEFORE FEDERAL TRADE COMMISSION

COMMISSIONERS:

Miles W. Kirkpatrick, Chairman  
Paul Rand Dixon  
Everette MacIntyre  
Mary Gardiner Jones  
David S. Dennison, Jr.

In the Matter of  
  
KENNECOTT COPPER CORPORATION,  
a corporation.

DOCKET NO. 8765

ORDER DENYING MOTION  
TO INTERVENE

This matter is before the Commission on the motion filed December 3, 1970, by United Steelworkers of America, AFL-CIO, to intervene as a party supporting the complaint. Complaint counsel on December 7, 1970, have filed a memorandum in opposition to the motion to intervene. The respondent in the proceeding, Docket No. 8765, Kennecott Copper Corporation, on December 7, 1970, also filed a memorandum in opposition to the motion to intervene. Movants having been granted their request to be accorded an opportunity to present their views and arguments on the issue in this case, and movants' petition not showing any cause requiring further Commission action, the Commission has determined that the motion should be denied. Accordingly,

IT IS ORDERED that the motion to intervene as a party supporting the complaint filed December 3, 1970, by United Steelworkers of America, AFL-CIO, be, and it hereby is, denied.

By the Commission.

SEAL

ISSUED: December 18, 1970

*Joseph W. Shea*  
Joseph W. Shea,  
Secretary.

APPENDIX - VOLUME 2

IN THE  
UNITED STATES COURT OF APPEALS  
FOR THE  
DISTRICT OF COLUMBIA CIRCUIT

No. 24,629

RECEIVED

JAN 15 1971

CLERK OF THE  
STATION

UNITED STEELWORKERS OF AMERICA, AFL-CIO,  
Petitioner,

v.

FEDERAL TRADE COMMISSION,  
Respondent,

and

KENNECOTT COPPER CORPORATION,  
Intervenor.

ON PETITION FOR REVIEW OF AN ORDER  
OF THE FEDERAL TRADE COMMISSION

United States Court of Appeals  
for the District of Columbia Circuit

FILED JAN 15 1971

*Nathan J. Paulson*  
CLERK

OFFICIAL TRANSCRIPT OF PROCEEDINGS  
BEFORE THE  
**Federal Trade Commission**

DOCKET NO. 3785

In the Matter of:

**KENNECOTT COPPER CORPORATION,**  
a corporation..

Place **Washington, D. C.**

Date **October 27, 1970**

Pages **1 thru 104**

**Alderson Reporting Company, Inc.**

*Official Reporters*

**300 Seventh St., S. W. Washington, D. C.**

**BEST COPY AVAILABLE**

**from the original bound volume**

# C O N T E N T S

## ORAL ARGUMENTS OF:

## P A G E

Joseph J. O'Malley, on behalf of the Federal  
Trade Commission

2

Michael H. Gottesman, on behalf of the United  
Steelworkers of America

25

William Simon, on behalf of the Respondent

49

## REBUTTAL ARGUMENT OF:

## P A G E

Joseph J. O'Malley

94

\*\*\*\*\*



BEFORE THE  
FEDERAL TRADE COMMISSION

-----  
In the Matter  
of  
KENNECOTT COPPER CORPORATION,  
a corporation.  
-----

Docket No. 8765

Room 532, Federal Trade Commission Building,  
Pennsylvania Avenue and Seventh St., N.W.,  
Washington, D. C.  
October 27, 1970

Met, pursuant to notice, at 1:57 p.m.

BEFORE:

- MILES W. KIRKPATRICK, Chairman
- PAUL RAND DIXON, Member
- EVERETTE MAC INTYRE, Member
- MARY GARDINER JONES, Member
- DAVID E. DENNISON, JR., Member

APPEARANCES:

- JOSEPH J. O'MALLEY, WILBUR W. SACRA, and LARRY D. SHARP, Attorneys for the Federal Trade Commission.
- MICHAEL H. GOTTESMAN, Attorney for the United Steelworkers of America.
- WILLIAM SIMON and JOHN BODNER, JR., Howrey, Simon, Baker & Murchison, 1707 H Street, N.W., Washington, D. C. 20006; and
- ARTHUR H. DEAN and ROY H. STEYER, Sullivan & Cromwell, 48 Wall Street, New York, New York 10005, Attorneys for the Respondent, Kennecott Copper Corporation.

P R O C E E D I N G S

CHAIRMAN KIRKPATRICK: Good afternoon. We are here this afternoon on Docket 8765, Kennecott Copper Corporation.

Mr. O'Malley, would you introduce counsel, if you please, sir?

MR. O'MALLEY: I am Joseph J. O'Malley, W. W. Sacra, and Larry D. Sharp for the Commission; Michael H. Gottesman representing the United Steelworkers; William Simon, John Bodner of the Howrey, Simon firm in Washington, Arthur H. Dean and Roy H. Steyer with Sullivan & Cromwell for Kennecott Copper.

CHAIRMAN KIRKPATRICK: Forty-five minutes has been allotted to Counsel supporting the Complaint, as I think you know, Mr. O'Malley; 30 minutes to the United Steelworkers of America; and 60 minutes to Respondent.

MR. O'MALLEY: Yes, sir.

CHAIRMAN KIRKPATRICK: Now you can divide that as you wish, if you want to reserve some time.

MR. O'MALLEY: I would like to reserve about 15 minutes for rebuttal, if I may, Mr. Chairman.

ORAL ARGUMENT OF JOSEPH J. O'MALLEY,

ON BEHALF OF THE FEDERAL TRADE COMMISSION

MR. O'MALLEY: May I proceed?

CHAIRMAN KIRKPATRICK: Yes, please do.

MR. O'MALLEY: Mr. Chairman, and if the Commission

1 please, this case is brought on appeal from an adverse ruling  
2 by the Hearing Examiner dismissing the Complaint, alleging a  
3 violation of Section 7 by Kennecott Copper Corporation's pur-  
4 chase of Peabody Coal Company. Kennecott is the largest  
5 domestic producer of copper, and Peabody Coal Company is the  
6 largest coal company in the United States.

7 At the outset, let me say that we have not treated  
8 this as a conglomerate merger. First, we have alleged, and we  
9 believe we have proven, that Kennecott Copper Corporation was  
10 in fact a competitive factor in the coal industry in the State  
11 of Utah prior to its acquisition of Peabody Coal Company, and  
12 secondly, that it was in fact a substantial potential entrant  
13 into the coal business.

14 Now I believe before assessing the errors that we  
15 have claimed the Examiner made, that it would be necessary to  
16 give some slight background of the history of Kennecott's entry  
17 into the coal business.

18 As early as April 1963, Kennecott Copper Corporation  
19 was in the rather embarrassing position of accumulating cash  
20 at a rate that would give them approximately \$1 billion by 1980.  
21 They decided, and the Examiner found, that the existence of  
22 this cash accumulation created an incentive and a need on the  
23 part of Kennecott to diversify. The question then was: How  
24 do we diversify?

25 On April 13, 1963, Edmund Guggenheim, whose family

1 put together Kennecott Copper Corporation, wrote to the Presi-  
2 dent of Kennecott and suggested that Kennecott look into west-  
3 ern coal reserves as being of interest to the company, because  
4 they came under the general heading of mining.

5 Three days later, New York headquarters of Kennecott  
6 wrote to Western Mining Divisions of Kennecott, headquartered  
7 in Salt Lake City, and told them to start investigating the  
8 possibility of Kennecott's entering the coal business, and the  
9 scope of the inquiry was defined in that letter.

10 They wanted an investigation along the lines of a pit  
11 mouth mine generating plant, on the order of the Four Corners  
12 operation of Utah Construction Company.

13 Now the Four Corners operation, when in full produc-  
14 tion will be putting out 8 million tons of coal a year. And  
15 in 1967, there were only two coal companies in the United States  
16 with more production than that. That was the scope of the  
17 operation that Kennecott had in mind.

18 On July 15<sup>th</sup>, New York headquarters again wrote to  
19 Salt Lake City and told them to expand the scope of the inves-  
20 tigation they were making, that Kennecott was interested in  
21 going into the coal industry on a national basis, that the  
22 interest on Kennecott's part was great.

23 By July 28, 1964, the Western Mining Divisions had  
24 located what they considered excellent reserves, called the  
25 Knight-Ideal, in Carbon County, Utah, and they asked New York

1 for authority to take out an option on that property, to retain  
2 a West Virginia mining engineering consultant firm called  
3 Robinson and Robinson to draw up plans for a new mine on that  
4 property, not the old mine, a new mine which would be capable  
5 of producing 1,165,000 tons of coal a year.

6 On October 9, 1964, New York granted that authority  
7 to Salt Lake City, the Western Mining Divisions. They took  
8 out the option, and then during the winter of 1964, exploratory  
9 drilling proceeded on the Knight-Ideal property.

10 And by December 31, 1964, the industry -- the coal  
11 industry in Utah -- became aware of Kennecott's plans.

12 And sometime in December, the Mormon Church, which  
13 has a mine in Utah, and the manager of which is also a repre-  
14 sentative of Peabody, approached Kennecott and suggested a joint  
15 venture in Huntington Canyon or in the Emery County area; and  
16 it was reported to Kennecott management that the Church was  
17 advised that Kennecott might be interested in this if they  
18 could control all of the commercial sales in the area, includ-  
19 ing the contract that Peabody had to supply coal from Utah to  
20 Nevada Power Company in Nevada.

21 By March 1965, Island Creek, the third largest coal  
22 company in the United States, was contacted, or contacted  
23 Kennecott; the Chairman and President of the Board of that com-  
24 pany contacted Kennecott and asked Kennecott about a joint  
25 venture on a railroad to take coal out of the Carbon County

1 properties.

2           It was reported to management again that the Western  
3 Mining Divisions did not look favorably upon this, because  
4 they, by putting in their own rail spur, could place Island  
5 Creek at a competitive disadvantage in the sale of coal, and  
6 in that same report it was reported that the Vice President of  
7 Peabody charged with sales had approached Kennecott and told  
8 Kennecott: "We don't want you in the coal business -- not to  
9 supply your own needs and not to sell it to anybody else --  
10 and to keep you out, we will offer you a low price on coal and  
11 we will offer you a 30 million ton defensive reserve some place  
12 else, but stay out of the coal business."

13           And this was reported to management. And in June,  
14 when it became apparent that Kennecott was going to proceed  
15 with their acquisition of the coal mine or coal properties,  
16 Peabody itself, the Vice President, wrote a memorandum in which  
17 he said that Kennecott's action threatened the head start made  
18 by Peabody in the coal industry in the State of Utah.

19           Now in April, Robinson and Robinson came out with his  
20 report and assessed the mine properties, or the reserves, rather,  
21 as being suitable for a new mine.

22           On June 10th, the Western Mining Divisions' own  
23 engineering department forwarded a memorandum, a large one,  
24 CX 61, advising management that an operation on the Knight-  
25 Ideal properties would be economically feasible.



1 I would like, because this, the Knight-Ideal goes  
2 to intent here, I would just like to cite one paragraph. It  
3 is CX 61-H, and this was the report of the Western Mining  
4 Divisions: This is the first phase of an overall feasibility  
5 study of the benefits to be derived to Kennecott through enter-  
6 ing the coal business, not only to supply the Corporation's  
7 western operations' captive requirements for coal, but also to  
8 aggressively seek particularly to supply the requirements of  
9 western power companies and major consumers.

10 And later in the same report: CX-61-P, they reported  
11 that they had discussions with Utah Power and Light Company,  
12 the largest consumer of coal in the State of Utah, and in an  
13 attempt to develop the sales potential with that company for  
14 its steam-generating facilities located in the State of Utah,  
15 they talked about freight rates and concluded that these rates  
16 would enable Kennecott to be competitive in taking out a sub-  
17 stantial long-term coal supply contract from Utah Power and  
18 Light Company.

19 This was forwarded to management in New York by  
20 J. C. Kinnear, who is the manager of the Western Mining Divi-  
21 sions. And he said to management, the only serious potential  
22 competitors presently envisioned by the Peabody Coal Company  
23 and the Island Creek Coal Company, "Both companies are highly  
24 competent as coal miners and marketers, and can be expected to  
25 become strong competition to Kennecott for commercial sales.



1 Nevertheless, it is believed that Kennecott should be fully able  
2 to compete, and in addition, the long-standing cordial rela-  
3 tionships with western utilities and other industrial users  
4 should also be helpful in soliciting outside sales."

5 On June 18th, the Board of Directors of Kennecott  
6 Copper Corporation met and the plans for the development of the  
7 Knight-Ideal reserves were presented to that Board, according  
8 to the Board's own minutes, and the Board authorized \$735,000  
9 for the purchase of the Knight-Ideal reserves and \$6-1/4 million  
10 for the development of that property.

11 A month later, the President of Kennecott Copper  
12 Corporation, Frank Milliken, sent a letter to the Board saying,  
13 "Here's what we talked to you about orally at your last meet-  
14 ing, when you approved the Knight-Ideal purchase."

15 He said that the studies had brought up two inter-  
16 esting situations, the second of which is that the possibility  
17 of Kennecott Copper Corporation entering into the coal mining  
18 business on a national or even international scale; and he  
19 concludes, on CX-67-B: "The fact that a company market suf-  
20 ficiently large to justify an economic coal operation already  
21 exists prompted us to make our initial investigation of the  
22 coal resources and potential in the inter-mountain area of the  
23 western United States."

24 Following the purchase of the Knight-Ideal, Kennecott  
25 formed a coal subsidiary, Kennecott Coal Company; it hired

1 Booz, Allen & Hamilton to seek out a coal executive, in their  
2 own words, "to build Kennecott up to a \$200 million-a-year  
3 producer of coal."

4 \$200 million a year in 1967, not 1965, since 1967,  
5 would have made Kennecott Copper Corporation either the third  
6 or fourth largest coal company in the United States. And this  
7 was a long-range plan in the coal business.

8 They didn't stop at Knight-Ideal. They sought out  
9 other reserves; they offered a hundred thousand dollars for  
10 reserves adjoining the Knight-Ideal, and as late as December 10,  
11 1965, they bid on properties containing, according to its own  
12 documents, CX-92, enough coal and enough water to service an  
13 electrical generating plant which would use as much as 5 million  
14 tons of coal a year, or more than the current production in  
15 Utah.

16 This is what Kennecott wanted to do, and as late as  
17 April 1966, the month in which they started active negotiations  
18 with Peabody, nobody ever told their Western Mining Divisions  
19 that they didn't have long-range plans for the development of  
20 the Knight-Ideal.

21 Every allegation of the Complaint, every material  
22 allegation, the history of the Kennecott's entry into the min-  
23 ing business, the coal mining business, was proved with the  
24 overwhelming evidence of Kennecott's own documents.

25 Now what are the defenses that have been raised, and

1 why did the Examiner dismiss the Complaint, in view of this?

2       The first defense is that the documents don't mean  
3 what they say. Kennecott says that they did all this to get a  
4 defensive reserve to protect themselves against a small utility  
5 company, Mountain States Fuel Company and Gas Company, protect  
6 them against gas rate rises. And as a matter of fact, one of  
7 Kennecott's own Directors said, "We were just playing a game  
8 with that utility out there."

9       For three years, Kennecott, from meeting engineers  
10 in Salt Lake City right up to the President and Board of Direct-  
11 ors of the Corporation, were writing memoranda, hiring con-  
12 sultants, conducting engineering studies, buying coal reserves,  
13 appropriating \$6-1/4 million for development, negotiating with  
14 Utah Power and Light to sell them coal, and they come on the  
15 stand and say, "We are just playing a game." And I stated  
16 in our brief that I found this unbelievable and incredible, and  
17 I still say so.

18       But even more, the President of the company, Frank  
19 Milliken, said, as far as his letters to the Directors was  
20 concerned, CX-67, that that didn't mean what it said.

21       And the Examiner, in discussing his testimony, which  
22 contradicted the documentation that he himself wrote and  
23 authorized, the Examiner said this: "The testimony is not  
24 inherently incredible under all the circumstances." That  
25 Milliken was hard put to explain away his documentary statements.

1 That there are inconsistencies between his testimony, and these  
2 inconsistencies are troublesome. Moreover, that despite the  
3 doubts engendered by CX-67, the Examiner accepted the testimony.

4 And as far as CX-92, where they went and bid on coal  
5 reserves, not associated with Knight-Ideal at all, again  
6 Mr. Milliken got on the stand and said he didn't mean what that  
7 thing said.

8 The Examiner, to find that these documents were  
9 incorrect, had to overrule the Supreme Court in its U.S. Gypsum  
10 Case, in which it said that when there is a contradiction or  
11 inconsistency between contemporaneous documentation, with no  
12 lawsuit in mind, and the testimony given much later by the  
13 authors of those documents, you have to accept the documentation.  
14 But the Examiner overruled the Supreme Court on this one.

15 COMMISSIONER DIXON: What was the time difference  
16 here?

17 MR. O'MALLEY: The documents started on April 16,  
18 1963, Commissioner Dixon. And the last one we have was in  
19 1966, March, April of 1966. The hearings commenced in January  
20 1969. So you have anywhere from three to six years.

21 Now the second point, and the second defense, was  
22 that Kennecott -- they paraded a host of witnesses to say  
23 Kennecott made a bad mistake back in 1965 and '66; that actual-  
24 ly you couldn't produce coal from the Knight-Ideal. As a mat-  
25 ter of fact, the Examiner found that there was no water down

1 there.

2       Of course, Utah Power and Light now is putting a  
3 plant down in Emery County, which is next to Carbon County,  
4 and there is water there, and the President of Utah Power and  
5 Light, the man with the need to know whether there was water  
6 or not, said in his testimony that there was enough water in  
7 Carbon County to have a plant; yet the Examiner found there  
8 wasn't, and he relied partially upon an economist who testified  
9 that he sat up in the University of Utah and never talked to a  
10 coal consumer in the State of Utah to determine what the future  
11 of coal was in that State. That's what the Examiner did on  
12 that one.

13       Now here is what they said. They said that the slope  
14 was too bad, mining conditions were too bad, faults were too  
15 bad, transportation was impossible. So here's what they said  
16 back in 1965. The letter CX-63-D to Management, recommending  
17 the purchase of Knight-Ideal, said, actually, while the Knight-  
18 Ideal reserve was not the largest one of the several under con-  
19 sideration, it was believed to be one of the best properties,  
20 and probably the best one, in terms of optimum seam heights,  
21 mining conditions, and coal quality.

22       And the President of Kennecott, that is CX-67 F, said,  
23 after describing the poor operations in that area, said that  
24 "Kennecott operation, on the other hand, would be operated to  
25 produce sufficient tonnage so that it could be highly competitive

1 for soliciting outside sales, particularly for long-term supply  
2 contracts to large industrial users, such as Utah Power and  
3 Light Company, Anaconda, and other smaller consumers and deal-  
4 ers."

5 And at any rate, El Paso says the potential competi-  
6 tion isn't affected by the lack of success of the potential com-  
7 petitor in trying to enter a market. And here, they never did  
8 get into the market, because they bought Peabody too fast.  
9 They never really had a chance to try it de novo; when they  
10 found out they could grab Peabody, they did, and the Examiner  
11 did, in talking about the El Paso case, which said that it  
12 doesn't matter whether you are successful or not, he said, "I  
13 am aware of El Paso, but nevertheless, here it is different."

14 So he overruled the Supreme Court in El Paso, too.

15 COMMISSIONER JONES: Counsel, what does the record  
16 show in terms of the reasons, if there are any, from internal  
17 documents of Kennecott, as to why they purchased Peabody? Any  
18 documentary evidence? Are there any internal study documents  
19 of Kennecott's?

20 MR. O'MALLEY: Well, there are internal studies, but  
21 these were made subsequent to the time that they actually  
22 entered the negotiations with Peabody. There was one made by  
23 Paul Weir, which analyzed all of Peabody's holdings and earnings.

24 COMMISSIONER JONES: What do Kennecott's own documents  
25 show as to their decision to purchase Peabody?



1 MR. O'MALLEY: As far as intent is concerned, Miss  
2 Commissioner Jones, and on July 30, 1965, we have a memorandum,  
3 CX-81, in which the President of the Board, the President of  
4 the Corporation, spoke to the Vice President in charge of  
5 exploration, and that was the first time that Peabody was men-  
6 tioned as a potential candidate for sale, and the reason that  
7 they believed or talked in terms of an acquisition rather than  
8 de novo entry at that time is because acquisition would make  
9 for faster progress.

10 Now in addition to this, Booz, Allen & Hamilton,  
11 according to their testimony, reported to Kennecott that the  
12 only way they could get into the coal business would be by  
13 finding a coal executive to lead them into the coal business,  
14 by buying some company; so of course they bought Peabody, which  
15 certainly gave them an executive to lead them into the coal  
16 business in a big way. But that is essentially how they got  
17 into it; Peabody was reported to Kennecott about March 17, 1966,  
18 as being available.

19 I believe there was a friendship between Paul Weir  
20 and Company, a Chicago coal consultant, and Harry Burgess, who  
21 was Vice President of Kennecott in charge of exploration, and  
22 they made it known that Peabody was available at that time,  
23 and Kennecott -- the basic reason is that they wanted to diver-  
24 sify.

25 COMMISSIONER MAC INTYRE: What is the significance of



1 the Hearing Examiner's findings on this point, pages 140 to  
2 143, about getting into the coal business, in order to buy a  
3 coal executive? What is the significance of that?

4 MR.O'MALLEY: I don't think it is very significant  
5 at all, Commissioner MacIntyre. This is what Booz, Allen &  
6 Hamilton finally concluded, that you had to buy a coal business  
7 to get a coal executive to lead you into the business, and of  
8 course, you are going around in a big circle. If you buy the  
9 business, you are in the business. Booz, Allen & Hamilton had  
10 a coal executive on their own staff; they didn't offer him the  
11 job.

12 The third point I would like to talk about is the  
13 geographic market. We had on the record the fact that Con-  
14 solidation, with Peabody, were at the time of the acquisition  
15 in Utah, and that we know that they were vying for a 3 million  
16 ton a year contract with Utah Power and Light; the President  
17 of Utah Power and Light testified to that.

18 That would come from Utah coal, that plant is being  
19 built in Utah, and if Kennecott was in the coal business in  
20 Utah, in a big way, it would have been a potential competitor  
21 right there in the State of Utah, and I don't know what we have  
22 to prove. There are three companies; two companies are compet-  
23 ing and a third one could, within a State, to sell Utah coal  
24 to a Utah company.

25 I don't know what we have to prove to have an area

1 of the country. As a matter of fact, the Supreme Court said  
2 all you have to do is show competition somewhere in the coun-  
3 try; and the Examiner said we have reduced it to absurdity by  
4 quoting the Supreme Court. But the Examiner, really, by  
5 saying we need a healthy economic study to show meaningful  
6 markets, and so forth, has overruled the Supreme Court in the  
7 past.

8 COMMISSIONER JONES: What is the significance,  
9 counsel, of the market? Is it significant because you want to  
10 show what the relative state of market shares were, and could  
11 you come to what those market shares were, in the possible  
12 markets? What does the record show on this?

13 MR. O'MALLEY: If Kennecott had opened up the Knight-  
14 Ideal and had produced 1,165,000 tons a year, it would have  
15 approximately 25 percent of the market in the State of Utah;  
16 if Kennecott was a potential competitor for the 3 million tons  
17 a year which Utah Power and Light is going to consume in addi-  
18 tion to what it has already consumed, if Kennecott were a  
19 potential competitor for that and successfully obtained that  
20 contract, then Kennecott would, indeed, approximately have  
21 about 60 percent of the market in Utah. That is just an off-  
22 hand figure.

23 COMMISSIONER JONES: I know, but you are talking about  
24 different markets. What is the state of concentration in the  
25 national market, the Western Mississippi market, the Mountain

1 States market, the Utah market? What is the significance of  
2 the market?

3 MR. O'MALLEY: The significance of it? I am afraid  
4 I don't understand your question.

5 COMMISSIONER JONES: Tell me what the state of con-  
6 centration in this market is.

7 MR. O'MALLEY: Peabody and ---

8 COMMISSIONER JONES: All of the possible markets,  
9 since we seem to have a difference as to which ones are the  
10 relevant ones.

11 MR. O'MALLEY: I refer to page 99 of the Appeal Brief,  
12 Commissioner Jones. The concentration in the United States as  
13 a whole, in 1947 -- 107 operating groups produced one million  
14 tones of coal; and actually, there were 68 in 1967.

15 The share of the 68 increased over that of the 107  
16 from 48.16 percent to 70.02 percent.

17 In '47, the largest 33 groups controlled 37-1/2 percent  
18 of the market; by '67, five groups controlled 32.6 percent of  
19 the market, and two companies (Consolidation and Peabody) con-  
20 trolled 21 percent in 1967.

21 I might add also, between 1955 and 1967, the total  
22 coal production in this Nation went up 80 million tons. Peabody  
23 production increased 45 million tons in that period of time, or  
24 45-1/2 -- pardon me; that is a little too much; 40 million tons  
25 for 45-1/2 percent of the increased production in the United

1 States of America.

2 In the State of Utah, as I said, the four producers  
3 controlled practically all of the market in that State.

4 Now I believe the major error of the Examiner went  
5 to the line of commerce and potentiality of entry by other  
6 firms. As far as his line of commerce is concerned, he said  
7 that the coal industry, or coal as a line of commerce, is so  
8 obvious that he doesn't have to cite any authority. He cited  
9 Brown Shoe and Bethlehem Steel only.

10 That's what he said was the line of commerce, but  
11 earlier in the brief, he excluded 20 percent of it, coking  
12 coal. At page 16 of the Initial Decision, he said, "The Exam-  
13 iner considers it inappropriate in a case dealing with compe-  
14 tition in the coal industry to exclude coke and coal"; and on  
15 the next page, page 17, he says, "Just as other fuels may be  
16 considered in analyzing the state of competition in the coal  
17 industry, so may coke and coal be excluded for the purpose of  
18 analyzing competitive factors in the coal industry."

19 Well, coke and coal, then, are not -- on page 16, it  
20 is; on page 17, it is not. But what he actually did was say  
21 coal is a line of commerce, but he didn't mean it. Because he  
22 assessed competition in this case not in the light of the coal  
23 industry, not in the light of competition among coal companies,  
24 but in the total energy market, of which coal is a very dis-  
25 tinguishable submarket; and in so doing, he goes at variance

1 with every Section 7 case ever decided by the Supreme Court.

2           On pages 201 and 202, the Initial Decision says,  
3 it is unrealistic to discuss the market, present or future, of  
4 the American coal industry except in the context of the energy  
5 industry as a whole.

6           And then he proceeds to say that all of the coal,  
7 the oil companies in the United States, are more potential  
8 entrants than Kennecott.

9           And he lined up criteria; only Kennecott, of all the  
10 companies mentioned in the record of this case, could meet  
11 those criteria. The ability, the technological ability, geol-  
12 ogists, engineers, materials handling, all of this, only Kenne-  
13 cott could meet it; but then he said, because the oil companies  
14 had experience in selling energy products, they are more poten-  
15 tial entrant into coal than Kennecott was.

16           The fact of the matter is that the coal, the oil  
17 industry has been gobbling up reserves, and they have been  
18 acquiring coal companies, but the testimony in this case is  
19 quite clear that they are doing this for the main purpose of  
20 holding on to these until gasification and liquefaction of coal  
21 into petroleum becomes feasible economically. And they are  
22 just holding on to most of these reserves.

23           And the only testimony about their mining, aside from  
24 an economist who was never a miner, comes from the Executive  
25 Vice President of Peabody, who said it is very likely that the

1 coal companies will do the actual mining of coal, rather than  
2 the oil companies.

3 They will do the mining when the oil companies want  
4 it out of the ground, because the oil companies have no  
5 experience at all in it.

6 Standard Oil has one contract, Kerr-McGee is mining  
7 only coking coal, and there is one unnamed oil company out in  
8 one of the Western States that made a toe-hold acquisition and  
9 has a contract to supply an electric utility, and that all  
10 happened since Kennecott bought Peabody.

11 COMMISSIONER MAC INTYRE: Well, going back to  
12 page 201 of the Initial Decision, to which you make reference,  
13 is there any dispute in the record about the fact of cross  
14 elasticity of demand as between these fuels?

15 MR. O'MALLEY: Certainly. There is a certain degree  
16 of cross elasticity.

17 COMMISSIONER MAC INTYRE: In other words, you would  
18 agree with that particular finding of the Hearing Examiner on  
19 that point?

20 MR. O'MALLEY: I wouldn't agree with it at all, no,  
21 sir. There is a degree of cross elasticity for one use of  
22 coal, and that is to supply a generating plant. There is a  
23 degree of cross elasticity there.

24 There is no cross elasticity in the use of coal, for  
25 example, to run an automobile. There is no cross elasticity



1 in the use of natural gas or uranium to provide coke for a  
2 steel plant. You can't use coal in a cement plant, for exam-  
3 ple; the ash in coal actually becomes part of the cement. You  
4 can't use oil or gas for that.

5 There are too many distinct uses of coal, so that  
6 as a total product there is no cross elasticity with any other  
7 product in the whole wide world.

8 COMMISSIONER MAC INTYRE: What about the utility  
9 companies?

10 MR. O'MALLEY: I said except for that, that one use  
11 of coal, and again, that one use of the other products. So --

12 COMMISSIONER JONES: What does the record show,  
13 counsel, in terms of exits and entries from this industry  
14 during this period?

15 MR. O'MALLEY: The only entry is Utah Construction,  
16 in the last 10 or 15 years. They have actually two small  
17 contract operations, each a hundred thousand tons a year.

18 COMMISSIONER JONES: You are talking entry by internal  
19 expansion?

20 MR. O'MALLEY: Yes.

21 COMMISSIONER JONES: How about entries by acquisitions?

22 MR. O'MALLEY: Oh, Continental or Consolidation,  
23 Gulf Oil; the oil companies have bought in.

24 COMMISSIONER JONES: But the record only shows one  
25 entry by expansion?



1 MR. O'MALLEY: The Initial Decision on page 54 has a  
2 table, Commissioner Jones, which shows oil companies owning,  
3 which own the largest, those of the largest 25 coal companies  
4 that they do own, and in each case, that has been by acquisi-  
5 tion.

6 COMMISSIONER JONES: And they are the only entries  
7 into the whole coal industry in the United States.

8 MR. O'MALLEY: The major ones, to the best of my  
9 knowledge.

10 I would like to say that the Examiner,-- we have con-  
11 tended that Kennecott was a de novo entry; the Examiner has  
12 denied that. We think the record does not support him at all.  
13 We think the record is overwhelming, especially in view of  
14 the documentation, that they were a de novo entry.

15 The Examiner admits that they were a potential entry  
16 by acquisition, and I will commend you to the Bendix Case, if  
17 Kennecott was indeed a potential entrant by acquisition into  
18 an industry in which concentration is growing, then it can't,  
19 as the largest copper company in the United States, buy the  
20 largest coal company in that second industry.

21 It can make a toe-hold acquisition, as I read Bendix.  
22 It can't go and buy the largest in the world, or the largest in  
23 this country.

24 COMMISSIONER DIXON: Do we charge that in this case?

25 MR. O'MALLEY: I am sorry?

1 COMMISSIONER DIXON: Did we make that charge in this  
2 case that you just argued?

3 MR. O'MALLEY: We didn't make any charge that Kenne-  
4 cott was a potential by acquisition, Commissioner Dixon. We  
5 said they are a potential entrant de novo, and we stand on  
6 that.

7 COMMISSIONER DIXON: All right, you must stand on it.

8 MR. O'MALLEY: We do. So that here, the Initial  
9 Decision has dismissed the Complaint. And unless there is a  
10 validity in the concept that a Hearing Examiner has the author-  
11 ity to overrule the Supreme Court on five different points in  
12 about ten different cases, then this opinion, his opinion, and  
13 his dismissal, should be reversed.

14 About one and a half minutes for questions.

15 COMMISSIONER JONES: What does the record show on  
16 entry barriers into this industry?

17 MR. O'MALLEY: Well, I think the record goes both  
18 ways, Commissioner Jones. I would have a very difficult time  
19 pinpointing it, because the Examiner felt that the entry  
20 barriers were rather high, that you had to have an awful lot  
21 of expertise, and there is a lot of money required for a large-  
22 scale operation, you see; it ranges between five and ten dol-  
23 lars a ton capital for each ton of annual production, so that  
24 if you had a 10-million-ton mine, which would be extremely  
25 large -- there is none that large -- if you had a 10-million-

1 ton mine, it would cost you somewhere between 35 and 100 mil-  
2 lion dollars to open it up and get it into full production.

3 COMMISSIONER JONES: You make some passing references  
4 in your brief to sort of a deep-pocket theory that the addition  
5 of Kennecott to Peabody would somehow enhance Peabody's ability  
6 to get long-range customers. I wondered just what you had in  
7 mind.

8 MR. O'MALLEY: I believe that is the Steelworkers'  
9 brief. I don't think I went to the deep-pocket theory very  
10 much, if I did at all.

11 Kennecott has, as a matter of fact, advanced Peabody  
12 \$25 million since the time of the acquisition, and at the time  
13 of the hearings, some \$25 million for the purpose of expanding  
14 Peabody's operation in a new mine, I believe, but that's the  
15 only thing of record that I know of where Kennecott has actually  
16 advanced money to Peabody.

17 CHAIRMAN KIRKPATRICK: Your 30 minutes is up.

18 MR. O'MALLEY:<sup>3</sup> Thank you.

19 CHAIRMAN KIRKPATRICK: You have 15 minutes for rebut-  
20 tal.

21

22

23

24

25

1 ORAL ARGUMENT OF MICHAEL H. GOTTESMAN,

2 ON BEHALF OF THE UNITED STEELWORKERS OF AMERICA

3 MR. GOTTESMAN: Mr. Chairman, members of the Commis-  
4 sion:

5 The Steelworkers' Union appreciates this opportunity  
6 to set forth its views with respect to the legality under  
7 Section 7 of Kennecott's acquisition of Peabody Coal. We  
8 believe that in two respects, quite dissimilar respects, the  
9 acquisition violates Section 7.

10 The first is the one about which Mr. O'Malley has  
11 talked, and which we have characterized in our brief as the  
12 horizontal aspect of the acquisition.

13 Kennecott was teetering on the brink of entering this  
14 industry, we submit, as a new company, coming in de novo, and  
15 it was teetering on the brink of doing so on a scale and in a  
16 size that would have made it one of the major companies in the  
17 coal industry, competing against Peabody, which was then the  
18 largest company in the industry.

19 If that can be established, and I will attempt to  
20 show, as Mr. O'Malley has, that this can be established from  
21 the record, we submit that the elimination of that additional  
22 competitive factor in the industry, which Kennecott would have  
23 been, will, or may tend substantially to lessen competition in  
24 this industry.

25 But we have also alleged, and the Complaint indeed

1 alleged in paragraph 30-F, what Commissioner Jones has referred  
2 to as the deep-pocket theory.

3         It alleged that wholly apart from Kennecott's inten-  
4 tion or plan or the expectation that it would enter as a com-  
5 petitor, even if Kennecott had never had any intention whatso-  
6 ever of entering the coal industry as a competitor, that com-  
7 bining Kennecott's enormous cash excess, which it intended to  
8 generate and expected to generate, and applying that to Pea-  
9 body, which already was the largest coal company in the indus-  
10 try, would have so enhanced Peabody's opportunity to compete  
11 in this industry as to tend to increase enormously what was  
12 already its predominant position in the industry.

13         Now I will come to that second point, I hope, in the  
14 time that has been allotted to me, but I would first like to  
15 discuss what we call the horizontal aspect, the one that  
16 Mr. O'Malley has talked about.

17         The Complaint alleged, and it was Complaint Counsel's  
18 burden to prove, essentially two things on that aspect of the  
19 case: first, that Kennecott was a potential entrant into the  
20 coal industry, and second, that the elimination of that poten-  
21 tiality may tend substantially to lessen competition.

22         The Initial Decision found adversely to Complaint  
23 Counsel on both of those points, although on each of them it  
24 found adversely in a rather peculiar way. Thus, on the ques-  
25 tion whether Kennecott was likely to enter the coal industry,

1 the Examiner found yes, indeed, it was likely to enter the  
2 coal industry; indeed, it had an intent to enter the coal  
3 industry, but that that intention applied only with respect to  
4 entering through acquisition.

5 Now I will discuss that. I think that is, whatever  
6 its legal significance, and Mr. O'Malley has argued that legal-  
7 ly, that can't make a difference, there is no factual support  
8 for the conclusion that Kennecott intended to enter the coal  
9 industry only through acquisition, and I will come back to  
10 that in a minute.

11 On the question whether this, assuming that were  
12 true, whether it was going to substantially lessen competition  
13 in the coal industry that Kennecott's potential competition had  
14 been eliminated, the Examiner really pegged his decision on  
15 one essential fact: namely, that as he saw it, this was not a  
16 concentrated industry; it was not a highly concentrated indus-  
17 try; therefore, the elimination of this competition was unlikely  
18 substantially to lessen competition.

19 There, too, we submit that a decision is untenable.  
20 Let me start with that one, because it is really, we think, the  
21 easier point, and takes less time to discuss.

22 This industry, as Mr. O'Malley has said, has been  
23 becoming more concentrated over the past several years. It is  
24 becoming not only more concentrated -- and by "more concentrated"  
25 I mean that the number of producing entities in the coal industry



1 has been becoming less and less, both through acquisitions and  
2 through smaller companies going out of business, and the share  
3 held by the very largest companies in the industry, and I am  
4 talking on a nationwide basis, has been going up and up. It  
5 had reached the point by 1966 -- 1967 or 1966 -- where the two  
6 largest companies in the industry, Peabody and Consolidated,  
7 had gone to 21 percent of the entire industry on a nationwide  
8 basis, and as Mr. O'Malley said, in the prior decade, of the  
9 entire increase in coal production in the United States, and  
10 there had been an 88-million-ton increase, nearly half of it  
11 was accounted for by Peabody alone; that is to say, in an  
12 industry whose total business is increasing enormously, Peabody  
13 is getting virtually one-half of all of the increase in the  
14 entire United States.

15 COMMISSIONER JONES: Counsel, what troubles me -- I  
16 realize that how high is up? is a hard question to answer.  
17 And you talk about this is concentrated, and you say it is  
18 21 percent, 29 percent. But according to the economic models,  
19 the economic theory, that to them is not a very concentrated  
20 market.

21 Now how far are we supposed to reach to determine  
22 whether this is the kind of concentration where you assume --  
23 if you will go on with your assumption for the moment -- Kenne-  
24 cott was a competitive factor, and that the loss of that com-  
25 petitive factor is going to lessen competition, how do you get



1 beyond? The only thing we can reach to, which is the econo-  
2 mists, who say that is not a very concentrated market.

3 MR. GOTTESMAN: Well, I know, I think there are  
4 obviously more concentrated industries than coal, as of this  
5 moment, and there are less concentrated industries. I think  
6 it is not really that helpful to try to characterize how con-  
7 centrated this is; there is a trend of concentration in the  
8 industry, better than some and worse than some, but the indus-  
9 try is becoming more concentrated.

10 There have been over the last few years a number of  
11 acquisitions of companies in that industry. It may take 20  
12 years, it may take 30 years, until this industry looks like the  
13 auto industry, but there is at least a beginning of this move-  
14 ment toward fewer and fewer companies, with the larger ones  
15 having a bigger and bigger share.

16 Now it is undoubtedly true, as the Initial Decision  
17 says, that compared to a lot of other industries, this one is  
18 not now highly concentrated; and what he said is that because  
19 that is so, there is no need to step in at this point and stop  
20 this acquisition.

21 Well, as we read the legislative history and the  
22 Supreme Court's decisions, particularly Brown Shoe, we read  
23 precisely the opposite conclusion from that fact. Precisely  
24 because this industry is not yet so heavily concentrated that  
25 it has lost all of its competitive vigor, precisely because

1 there is still enough left there, enough companies, enough com-  
2 petition between them, that this is a viable industry, with  
3 potentiality for competition, it is more important that the  
4 Commission step in at this stage and stop this kind of a mas-  
5 sive elimination of competition, than in an industry which is  
6 already so oligopolistic that competition doesn't exist.

7 And I think, if I may, the language of the Supreme  
8 Court's decision in Brown may be very pertinent here. This is  
9 the Court speaking, at 370 U.S. at page 315, it said:

10 "The dominant theme pervading Congressional consid-  
11 eration of the 1950 Amendments was a fear of what was considered  
12 to be a rising tide of economic concentration in the American  
13 economy; not yet a tidal wave, but a rising tide."

14 And then they said: "Congress saw the process of  
15 concentration in American business as a dynamic force. It  
16 sought to assure the Federal Trade Commission and the courts  
17 the power to break this force at its outset, and before it  
18 gathered momentum."

19 Now obviously what the Court was talking about was  
20 getting in there early, not getting in there after there has  
21 been the kind of terrible concentration seen that does exist  
22 in some industries; but getting in there at the outset, and  
23 before the concentration gathers momentum, stopping it at that  
24 point.

25 Now what you have got in this industry, as I have

1 said, is a gathering momentum. It started slow, it is getting  
2 faster, but it can't be disputed that this industry is becoming  
3 more concentrated. But it is an industry that can still be  
4 salvaged.

5 And here in the face of this rising concentration  
6 was, as Mr. O'Malley has said, the most likely entrant into the  
7 industry, one that projected an entry on a scale which would  
8 have made it one of the largest forces in the industry, and  
9 obviously would have had major competitive invigoration of the  
10 industry, eliminated by virtue of its acquisition of what was  
11 already the largest company in the industry.

12 COMMISSIONER DIXON: May I ask you a question there?

13 This was a \$400 million cash purchase, wasn't it?

14 MR. GOTTESMAN: I believe it was about 285.

15 COMMISSIONER DIXON: Well, I don't know -- 400 million  
16 somewheres.

17 MR. SIMON: 585.

18 MR. GOTTESMAN: It was \$285 million purchase and the  
19 assumption of \$300 million loan to be paid out of operations  
20 and earnings.

21 COMMISSIONER DIXON: That is a sizable merger.

22 MR. GOTTESMAN: Substantially.

23 COMMISSIONER DIXON: Who do you think could have  
24 purchased this company and not violated the law, as you see the  
25 law?

1 MR. GOTTESMAN: Well, No. 1, a company which was not  
2 a potential entrant into the coal industry.

3 COMMISSIONER DIXON: All right.

4 MR. GOTTESMAN: That would just be substituting  
5 Peabody for Peabody. Although I think it is hard to say that  
6 anybody willing to put out the kind of money that it took to  
7 buy Peabody would not have been a potential entrant.

8 Perhaps the answer is that no existing corporation  
9 of the magnitude of a Kennecott, with that intention, as we  
10 will get to showing Kennecott had, of getting into coal, could  
11 acquire Peabody.

12 Peabody, I might add, we don't have the "failing  
13 business" doctrine here. Peabody was an enormously profitable  
14 company.

15 COMMISSIONER DIXON: I understand, without the reading  
16 of "novo" here, could Kennecott have bought Peabody without  
17 transgression -- without transgressing Section 7?

18 MR. GOTTESMAN: You mean, if the economists were to  
19 conclude that it had absolutely no intention of entering?

20 COMMISSIONER DIXON: That is right.

21 MR. GOTTESMAN: I think not. I think on this point  
22 we may be somewhat at odds with Mr. O'Malley, but the whole  
23 gist of our second contention, which relates to the so-called  
24 deep-pocket theory, would suggest that whether or not Kennecott  
25 had any intention of entering this industry, it could not buy

1 Peabody.

2 COMMISSIONER DIXON: Why?

3 MR. GOTTESMAN: Because -- well, it could not buy  
4 Peabody with the intention that it had. The intention it had  
5 was to -- well, let me back up one minute.

6 Kennecott expected to generate a billion dollars in  
7 cash, which it could not reinvest in the copper industry over  
8 the next several years. And the reasons why it couldn't rein-  
9 vest it in the copper industry are several, but there is no  
10 dispute that the Examiner found that it could not reinvest that  
11 money in the copper industry.

12 And so it made a decision, which the Examiner found,  
13 that it had to diversify and get into another industry.

14 Now there are a number of ways that a company can  
15 spend a million dollars. It can say, "We are going to get into  
16 six little industries," or "We are going to get into six big  
17 industries in a little way."

18 COMMISSIONER DIXON: But any time they come, they are  
19 a billion dollar industry.

20 MR. GOTTESMAN: Well, what Kennecott decided to do  
21 was to get into one other question. It made a judgment: "We  
22 are going to pick an industry and get in that industry, and that  
23 is going to provide the place where we can deposit all of this  
24 excess cash we expect to generate from the copper business."

25 And it was with that clear background that Kennecott

1 decided ultimately to acquire Peabody.

2       Now I think the reasonable expectation is that Pea-  
3 body, which was already a 300-something million dollar asset  
4 company, and with that asset, as the largest company in the  
5 industry, is now going to get an infusion over the course of  
6 the next several years of perhaps two or three times that  
7 amount of assets, because Kennecott is generating this incred-  
8 ible amount of money and there is no place to put it except  
9 Peabody, and indeed, that is why it bought Peabody, to put it  
10 there. I will come into more detail on this later.

11       But basically, there are a lot of things Peabody can  
12 do to increase its market share, if you double or triple its  
13 assets. To take one example, the Examiner found that there  
14 was a -- well, there is obviously a given amount of coal that  
15 one can find in the United States; he found that it was not  
16 overly abundant, that there was in fact already substantial  
17 competition among the coal companies to acquire what coal  
18 reserves exist in this country, particularly the most attractive  
19 of them.

20       If you give Peabody three times the assets of any other  
21 company in the coal industry, its ability to compete for and  
22 attain those coal reserves and coal resources obviously is  
23 enormously enhanced. And if it can acquire any substantial  
24 percentage of the most attractive coal reserves in the United  
25 States, it can double, triple, quadruple its market share of



1 this industry.

2           Similarly, Kenecott -- and the other aspect of this,  
3 Kennecott is, the Examiner found, the most sophisticated  
4 mineral extractor in the world. Now admittedly, it has been  
5 extracting copper, lead, and zinc, and not until now, coal --  
6 but it is digging holes for the extraction of copper, hundreds  
7 of times as large as a coalmine.

8           It has got much more sophisticated techniques, much  
9 more advanced machinery for doing this kind of thing, and with  
10 those kinds of resources, will be enormously advantaged over  
11 the other traditional coal companies in bidding for the coal  
12 which is now getting to be harder and harder to get.

13           One of the things the Examiner found is that as the  
14 easiest grades of coal get mined away, what is left to be mined  
15 is harder and harder to get to, more expensive to get to, more  
16 difficult to extract, and so on.

17           Now give Peabody, with already the largest market  
18 share, not only the opportunity to buy up all of these, with  
19 these new assets, but also the company with the greatest exper-  
20 tise in the United States in mineral extraction, and with the  
21 most sophisticated equipment to do it, and it stands to reason  
22 that it is going to have a tremendous advantage in being able  
23 to develop techniques for mineral extraction that will make  
24 those marginally economic mines as they exist today much more  
25 economic and to reduce the cost with which the extraction can

1 take place.

2 COMMISSIONER DIXON: Are you saying or indicating  
3 that because of the overall mining background of Kennecott, that  
4 whether or not they were in coal, they were by virtue of this  
5 background a potential entrant into the coal business?

6 MR. GOTTESMAN: Yes, I think we are saying three  
7 things:

8 No. 1, irrespective of whatever intent they might  
9 have harbored at the moment, given this company, given its  
10 cash-generating structure, and given its talents in the mineral  
11 field, it had already diversified into lead and zinc, from  
12 copper; anybody looking objectively at this scene would have  
13 said, "There is a potential entrant into the coal industry."

14 No. 2, we are saying it actually did harbor the  
15 intent to get in; and

16 No. 3, we are saying, wholly apart from either of  
17 those first two things, it is now in, it has acquired Peabody,  
18 and the effect of its doing so is going to be to so enhance  
19 Peabody's role in the industry as to substantially lessen com-  
20 petition in the industry.

21 So we are really saying three different things.

22 COMMISSIONER DIXON: Now when you get to the third  
23 one, are you talking about deep-pocket?

24 MR. GOTTESMAN: Yes. We haven't used that term.

25 COMMISSIONER DIXON: Well, if I could use the term.

1 MR. GOTTESMAN: Right. But essentially what we are  
2 saying is, Kennecott's money and experience in mineral extrac-  
3 tion, added to Peabody's market share, its obvious success in  
4 finding customers and so on, takes Peabody, which is already  
5 the largest company in this industry, and gives it an enormous  
6 additional advantage which is didn't previously have, toward  
7 expanding what is already the predominant market share in the  
8 industry.

9 COMMISSIONER DIXON: That is getting very close to  
10 saying "size."

11 MR. GOTTESMAN: Yes. Size and size.

12 Well, not only size. You see, there is a difference  
13 between Kennecott and most companies, which is Kennecott's  
14 admission that it is going to generate this enormous amount of  
15 money with nothing else to do with it.

16 Now other companies can come along, as big as Kenne-  
17 cott, and acquire somebody, and say, "Look, we have still got  
18 to run our other business. We don't expect to have any enor-  
19 mous unused outlay of cash to go pouring down this new vessel."

20 Kennecott has this -- and the record is clear on  
21 this and undisputed -- and said, "We are going to have a bil-  
22 lion dollars generated with nothing else to do with it."

23 So perhaps what I am saying is that to take a billion  
24 dollars and by acquisition add that to the largest company in  
25 an industry is a very frightening thing in terms of the

1 competition of that industry, where it is already a concen-  
2 trated industry. I think that is what we are saying; that,  
3 plus the mineral techniques.

4 COMMISSIONER DIXON: Is this another way to argue  
5 the "leading firm" argument?

6 MR. GOTTESMAN: I think this case is very different  
7 from any other case. It is not just that Peabody is the lead-  
8 ing firm; it is that Kennecott is a unique kind of combination  
9 to put with Peabody: all that cash, not used, and with nothing  
10 else to do, all of that mineral expertise, you know, this  
11 proven ability to do much more than a coal company.

12 COMMISSIONER DIXON: I can see your time running.

13 What is the special interest of labor here? What is  
14 the worry that labor has?

15 MR. GOTTESMAN: Well, "special interest of labor"  
16 may not be quite the right words. We have expressed, really,  
17 two interests in this. No. 1 is, I guess, it must be clear  
18 from reading the newspapers about political campaigns every day,  
19 the working man has gotten more and more upset about his role  
20 as a consumer in this country.

21 Prices are going out of sight, the consumers who are  
22 working men are hit hardest by that, and over the past several  
23 years, the Steelworkers Union has increasingly gotten involved  
24 in what would commonly be called "consumer interest" kinds of  
25 ventures.

1           We see this kind of acquisition as the kind which in  
2 the long run, because of its lessening of competition, is going  
3 to start raising prices, in this case, the prices of getting  
4 your electricity from your electric utility, and as such, it  
5 is an appropriate one, we think;

6           We have done it in previous conglomerate merger  
7 situations. It is an appropriate one for us to express our  
8 view to the FTC that this is the kind of thing that ought to  
9 be struck down, under Section 7.

10          COMMISSIONER DIXON: Well, now, I have listened to  
11 enough questions and discussions in the steel industry to know  
12 that if following you is Management, they would say the reason  
13 the price of steel has gone up is because the price of coal and  
14 coke and labor, you see ---

15          MR. GOTTESMAN: Right.

16          COMMISSIONER DIXON: So you are telling us you are  
17 interested in this because it increased price of coal, I must  
18 assume ---

19          MR. GOTTESMAN: That is correct.

20          COMMISSIONER DIXON: -- and other energy-producing  
21 minerals, or methods.

22          MR. GOTTESMAN: That is correct. That is one of the  
23 two interests we expressed. And that one obviously relates to  
24 the Commission's business.

25          The second one, we made very clear, does not relate

1 to how the Commission ought to decide this case, though Kenne-  
2 cott keeps filing documents saying we are trying to drag red  
3 herrings through this case. We have pointed out that conglom-  
4 erate mergers create enormous problems in labor relations.

5 We don't say that is something the Commission is  
6 supposed to do anything about, but it is nevertheless the fact.  
7 We had a nine-month strike in the copper industry in 1967  
8 because of the difficulties created by the fact that the copper  
9 companies like Kennecott had already conglomerated into other  
10 metals, lead and zinc.

11 We fear that the additional conglomeration into still  
12 other industries, such as coal, is going to make that even  
13 worse.

14 COMMISSIONER JONES: With your admission, Counsel,  
15 that that is none of FTC's business, why do you urge us as  
16 part of your brief?

17 MR. GOTTESMAN: I do not. There is not a word in our  
18 brief about that, except for one point.

19 COMMISSIONER JONES: Well, you made quite a discus-  
20 sion about your concerns with the social impacts of the mergers.

21 MR. GOTTESMAN: Right.

22 COMMISSIONER JONES: Now what relevance should we  
23 apply to that?

24 MR. GOTTESMAN: None. We made those to explain why  
25 we were interested in intervening.



1 COMMISSIONER JONES: Do you think it goes to your  
2 intervenor's interest as distinct from ---

3 MR. GOTTESMAN: Absolutely. There is only one very  
4 limited ---

5 COMMISSIONER JONES: Mustn't your interest -- and  
6 bear with me Counsel, because this is obviously a question that  
7 is of concern to all administrative agencies -- mustn't your  
8 interest asserted as a basis for intervention be something that  
9 the agency presiding can respond to in some way? That is an  
10 interest that you admit.

11 MR. GOTTESMAN: That is right; we expressed four  
12 reasons in our Motion to Intervene, why we thought we were  
13 entitled to intervene. They are interrelated in one way or  
14 another to our position as representative of consumer interests.  
15 Each of those, independently, we think, justifies our inter-  
16 vention, through the Commission or otherwise.

17 We were delighted to see in this morning's paper  
18 that the Commission at least ---

19 COMMISSIONER JONES: Don't get yourself in another  
20 argument, stay ---

21 COMMISSIONER DIXON: Don't raise that.

22 COMMISSIONER MAC INTYRE: In other words, what you  
23 are saying is, you regard antitrust action as a consumer-  
24 protection action?

25 MR. GOTTESMAN: We regard one of the purposes of

1 Section 7 of the Clayton Act to, by invigorating competition,  
2 to keep the price down. That is right.

3 COMMISSIONER MAC INTYRE: As a consumer-protection  
4 act?

5 MR. GOTTESMAN: Well, it is one in which one of the  
6 interests to be protected is consumer interest. And that's  
7 the one that we came here to indicate.

8 Commissioner Dixon asked what was labor's interest,  
9 and I was responding. I was not trying to suggest that the  
10 Commission should set aside this acquisition because it is  
11 going to wreak havoc in collective bargaining. That's not the  
12 Commission's job. The Labor Board is having its own diffi-  
13 culties taking care of that problem.

14 Perhaps it needs help, but we are not suggesting you  
15 should supply it.

16 I would like, in my remaining what I think is five  
17 minutes, perhaps a couple more, to deal with the question:  
18 Was Kennecott a potential entrant?

19 And now we are back on the horizontal half of the  
20 case, as we described it. I must confess that we have read  
21 Kennecott's brief with utter astonishment, even more than we  
22 read the Initial Decision with, because we, like Mr. O'Malley,  
23 read the documents in this case. We read what Kennecott's  
24 officials were saying to each other and to their Board of  
25 Directors at the time they were contemplating the acquisition

1 of Knight-Ideal and shortly thereafter.

2 And we then read what is found to be the case, and  
3 what Kennecott now says to be the case, and there is such an  
4 extraordinary divergence between the two that it is absolutely  
5 unbelievable.

6 I would like to give a couple of examples. It is a  
7 little bit like "double-think" and we sort of sit there shak-  
8 ing our head and we can't figure it out. Everybody agrees  
9 Kennecott was interested in getting into a new business.  
10 Everybody agrees that oil and coal were the two major industries  
11 that it seriously considered.

12 The Hearing Examiner found that Kennecott had aban-  
13 doned the intention to get into oil by the end of 1965, because  
14 it couldn't do it. And all logic points to the fact that that  
15 made coal the logical place Kennecott was going to get in.

16 At no point in time throughout this entire record is  
17 there a single document which says or even suggests that Kenne-  
18 cott couldnot have entered the coal industry de novo, or  
19 through the kind of very minimal acquisition it made when it  
20 acquired the properties of Knight-Ideal.

21 There are repeated discussions in the various docu-  
22 ments about "which is the better way, which in the long run will  
23 benefit us more quickly, more effectively, should we do it by  
24 de novo entry, should we do it by the acquisition of a small  
25 company or two and build on that, or should we come in and make

1 a joint acquisition?" as they ultimately decided to do.

2 All the way through, Kennecott had all three possi-  
3 bilities on the table, and was juggling them around. Finally  
4 along came Peabody, and it was just too much for Kennecott to  
5 resist; they could gobble it up and be No. 1 overnight, and  
6 that's what they did.

7 But to say that had Kennecott been told, "No, no,  
8 you are not allowed to take Peabody," that it would not have  
9 entered into the industry de novo, is just inconceivable from  
10 this record; even in the few months immediately preceding the  
11 acquisition of Peabody, this was after they had bought the  
12 Knight-Ideal reserves, and their meeting with Paul Weir and  
13 Company to discuss "how can we best get into the industry, should  
14 we do it this way or that way?" and Paul Weir and Company says  
15 to them, "Look, it will be faster if you get in through the  
16 acquisition, and we just happen to have Peabody Coal Company  
17 waiting for you."

18 But even up to that point, Kennecott is meeting and  
19 discussing which of these several alternatives is the best way  
20 to get in.

21 Now Knight-Ideal is very significant here. It is not  
22 as significant as the Hearing Examiner tries to make it. He  
23 sets it up as a great big balloon, shoots it down, and says,  
24 "That's the end of the case." Knight-Ideal is significant  
25 because of its evidence of Kennecott's intent.

1 Kennecott wasn't going to buy the Knight-Ideal prop-  
2 erty and then say, "Here we are in the coal industry." That  
3 was simply, as Kennecott's own document called it, a spring-  
4 board into the coal industry. But Kennecott now tries to  
5 characterize that, what they then called their spring-board  
6 into the coal industry, as something that had nothing to do  
7 whatsoever with entering the coal industry.

8 Kennecott now tries to say, "Look, we needed or we  
9 considered coal as a possible material to fuel our Utah Copper  
10 Division, and we figured we would buy ourselves a few reserves  
11 out there in Utah, and then we would have a ready supply of  
12 coal for our captive use; and besides that, even if we didn't  
13 have to use it, the mere fact that we had it would cajole our  
14 gas supplier into lowering his price."

15 "Therefore," says Kennecott, "that's why we bought  
16 that thing. It had nothing to do with entering the coal indus-  
17 try. That was a nice device to take care of our captive fuel  
18 programs."

19 It is very nice for Kennecott to say that now, but  
20 every document they wrote, back in the time they acquired  
21 Knight-Ideal, said quite the contrary, said, "We are acquiring  
22 that property or thinking about it for two reasons: No. 1, we  
23 can use about a third of the coal that is in there for the  
24 purpose of supplying our captive purposes, but the other two-  
25 thirds will beautifully set us up to get into the coal industry,

1 in the West, and we have explored what the various customers  
2 are and who they are, and we think this is a beautiful setup  
3 for that purpose."

4 I will close by referring the Commission to the  
5 letter from the President of Kennecott to his Board of Directors  
6 a month after Knight-Ideal was purchased, and this was six  
7 months before Peabody was acquired, and it appears at pages 21  
8 to 22 of our brief.

9 One moment of background: Kennecott says, "Obviously  
10 we didn't buy Knight-Ideal for competitive purposes in the  
11 industry or for commercial purposes; because that isn't even a  
12 very good location to have coal for those purposes. And  
13 besides," they say, "we only bought it for captive purposes."

14 Well, two things: No. 1, after buying these reserves,  
15 which were three times what they needed for their captive pur-  
16 poses, they immediately proceeded out and started to bid on  
17 still more reserves. Well, they must have been just the most  
18 conservative oversuppliers in history, if they were still buying  
19 more when they had already purchased three times what they  
20 needed for their own use.

21 The second thing is the explanation the President of  
22 Kennecott supplied his Board of Directors. He was explaining  
23 "Why did we pick those coal properties rather than others?"  
24 He referred first of all to the fact that "we had two interests:  
25 No. 1, to supply our captive uses, and the possibility of



1 Kennecott Copper entering into the coal-mining business on a  
2 national or even international scale."

3 He then discussed various possibilities of where they  
4 might have purchased coal fields. He said they rejected  
5 Southern Utah because (quote) "This coal field can't economi-  
6 cally now serve the more profitable northern markets and has  
7 no near-term value to Kennecott for an early entry into the  
8 coal business.:

9 They rejected Wyoming because utility plants -- and  
10 utilities, of course, are the customers -- "utility plants and  
11 coal land ownership controlling future expansion of this opera-  
12 tion make it impractical for Kennecott to consider a coal  
13 venture in this area during the foreseeable future."

14 Colorado and New Mexico reserves were dismissed as  
15 having (quote) "limited commercial marketability and interest  
16 to Kennecott at this time." They weren't considered because  
17 "None of these fields can be expected to supply any appreciable  
18 part of the Inter-Mountain or West Coast Markets."

19 Now this was the President of Kennecott Copper Cor-  
20 poration writing to his Board of Directors, a month after the  
21 decision to acquire Knight-Ideal, at a time when they had just  
22 voted \$6-1/4 million to actually make start an operational  
23 mine on the Knight-Ideal premises.

24 But now in this hearing, they are telling the Commis-  
25 sion, "Oh, we had no intention of getting into the coal industry

1 when we bought that. That was just to supply our captive needs."

2 CHAIRMAN KIRKPATRICK: Let me be sure I understand  
3 your point. Am I correct in saying that it is not essential  
4 to your case that the propositions that you are asserting of  
5 entry of the industry de novo are proved?

6 MR. GOTTESMAN: That is right.

7 CHAIRMAN KIRKPATRICK: Because intent or not, Kenne-  
8 cott was a natural, so to speak, overhanging the market.

9 MR. GOTTESMAN: Right.

10 CHAIRMAN KIRKPATRICK: And sharpened the competitive  
11 elements in a concentrated market; and secondly, it did take  
12 this route, and a characteristic of the deep-pocket theory is  
13 either of those, absent any specific intent ---

14 MR. GOTTESMAN: Yes, but what I have now addressed  
15 myself to is the third point, that even if intent were essential,  
16 it is indisputable on this record that Kennecott had it.

17 I think my time is up.

18 CHAIRMAN KIRKPATRICK: Your time is up, and we will  
19 take a ten-minute recess.

20 (A ten-minute recess was taken.)

21

22

23

24

25

1 CHAIRMAN KIRKPATRICK: Mr. Simon.

2 ORAL ARGUMENT OF WILLIAM SIMON,

3 ON BEHALF OF RESPONDENT

4 MR. SIMON: Mr. Chairman, Members of the Commission

5 This case involves the acquisition of a coal company  
6 by a copper; and except for the fact that they are both in the  
7 mining industries, there is no relationship between them. The  
8 fact is that Kennecott in its entire corporate history has  
9 never produced a single pound of coal, has never sold a single  
10 pound of coal.

11 I would like also to assure you at the outset that  
12 dismissal of this case will not in any way affect the Commis-  
13 sion's study of the energy market. This is not a case of one,  
14 a company in one sector of the energy market acquiring a com-  
15 pany in another sector of the energy market. Kennecott was  
16 totally divorced from the energy market. It is not an oil  
17 company acquiring a coal company or a gas company or a utility  
18 company acquiring a coal company.

19 And with respect to your energy study, we may take  
20 comfort from this finding of the Hearing Examiner which is at  
21 page 198 of his Initial Decision, and I quote:

22 "At any rate, when one considers the movement of oil  
23 and gas companies into the coal industry, companies that pro-  
24 duce competing fuels, some comfort may be derived from the fact  
25 that Peabody was acquired by a company engaged in an essentially

1 unrelated business, albeit both were engaged in mining. As a  
2 copper and coal enterprise, Kennecott-Peabody should prove  
3 some counterbalance to the developing energy companies with  
4 their control of various competing energy sources."

5 Now this, if the Commission please, is basically a  
6 fact case. And I intend to devote my time to discussion of  
7 facts.

8 This case involved a ten-week hearing with 54 wit-  
9 nesses, 6,000 pages of transcript, and thousands of pages of  
10 documents, in addition to an entire week spent by the Hearing  
11 Examiner going through mines of various kinds and even a trip  
12 to the Knight-Ideal mine, which was near the top of a mountain  
13 and accessible only by tractor, and all of these visits were  
14 in the company of witnesses who later testified to what was  
15 shown to the Hearing Examiner and were cross-examined on what  
16 the Hearing Examiner saw.

17 I would also say the Commission had most experienced  
18 antitrust merger counsel representing the prosecution in this  
19 case. Although Mr. O'Malley is new to the Commission, for many  
20 years he tried antitrust merger cases at the Department of  
21 Justice and at the Controller of the Currency. The fact that  
22 he was unable to make out a Section 7 case was not due to the  
23 Commission not being represented by experienced counsel.

24 And in our view there are two major failures in the  
25 Commission's proof. First, they failed to prove the adverse

1 competitive effect in any market, either geographic or product,  
2 and secondly, they failed to prove a reasonable probability of  
3 a substantial lessening of competition, that is, the competi-  
4 tive effects, and I think it is significant that in his argu-  
5 ment today, Mr. O'Malley said not one word -- not one word --  
6 about competitive effects.

7         It is true that counsel for the Steelworkers talked  
8 about competitive effects. But it is also significant that his  
9 argument of competitive effects was based on a view entirely  
10 outside the record. Mr. O'Malley had previously disowned, in  
11 response to a question by one of the Members of the Commission,  
12 that the deep-pocket theory had been one of the views on which  
13 this case was tried. And yet that is the argument of the  
14 Steelworkers.

15         Now at the Hearing Examiner level, in his briefs to  
16 the Hearing Examiner, Complaint Counsel argued for a double  
17 per se rule. He said we were a per se potential entrant, and  
18 because we were a per<sup>se</sup> potential entrant, the case involved  
19 a per se violation.

20         The Hearing Examiner rejected that view, and he has  
21 since abandoned it. He now says that this case is squarely  
22 like El Paso, that it is the same as Procter and Gamble, and  
23 that it is identical to Bendix. I believe that those views  
24 are absurd, and I think I can demonstrate that to your satis-  
25 faction.

1           Now, Knight-Ideal is at the heart of this case. In  
2 the trial below, Complaint Counsel said that Knight-Ideal was  
3 the heart of his case. He has now changed the view to saying  
4 it is a heartbeat. But the Complaint makes clear that that is  
5 what was at the heart of the Commission's Complaint.

6           And we believe that the evidence shows that the  
7 Complaint was based on a misconception of the fact with respect  
8 to Knight-Ideal. I think I can say that all the oral evidence,  
9 the witnesses called by Complaint Counsel as well as our wit-  
10 nesses, supports our view. But I can also say to you ---

11           COMMISSIONER DIXON: How about the written evidence?

12           MR. SIMON: But I can also say to you -- and my notes  
13 will prove, Commissioner Dixon, that if you hadn't interrupted,  
14 I would have said -- I can also say to you that all of the con-  
15 temporaneous documents ---

16           COMMISSIONER DIXON: I have got a long memory about  
17 a case called the Appalachian Apple Case, and I remember all  
18 the written documents were put in by counsel, and then he  
19 decided to really prove his case, called all the writers. And  
20 all the writers said they didn't mean a thing they wrote.

21           MR. SIMON: Commissioner Dixon, there is no signifi-  
22 cant conflict between the documents and the oral testimony,  
23 and this is what I am about to demonstrate.

24           COMMISSIONER DIXON: Isn't that really right at the  
25 nexus of this case, as to whether or not we are to believe what



1 is written or what is said?

2 MR. SIMON: I think it makes no difference which  
3 view you take. You reach the same result.

4 COMMISSIONER DIXON: All right, sir.

5 MR. SIMON: Now, sir, first I would urge that it is  
6 necessary to distinguish between what was going on in Salt  
7 Lake City, Utah, locally, among the people out there in the  
8 field, and what their views were and what they would have liked,  
9 from what the Management of the company in New York decided,  
10 the people who made the decisions for the company.

11 And secondly, it is necessary to distinguish between  
12 Kennecott's problems of diversification, the problem of invest-  
13 ing \$500 million that was to be generated that they had to  
14 find a place to invest, from the problem of fuel for the boilers  
15 at the Bingham Canyon Power Plant at their Bingham Canyon Mine.

16 Now the evidence is clear, all documentary, that in  
17 the late 50's and early 60's we were having very serious trou-  
18 bles with our fuel costs at the Bingham Canyon Copper Mine,  
19 and the evidence is that we went out and tried to buy natural  
20 gas fields from people who were producers, to buy our own gas,  
21 and on three occasions we had a gas field lined up, and Moun-  
22 tain Fuel, which is the only gas company in the State, went  
23 and bought these reserves out from under us.

24 After many years of trying to get our own gas reserves,  
25 we then considered converting to coal and efforts were made to

1 buy coal.

2 Now this is necessary because we had a 195-megawatt  
3 power plant with a smelter, which if wholly converted to coal,  
4 would use 800,000 tons of coal a year. As early as 1962 and  
5 1963, we had tried to renegotiate a contract with the gas com-  
6 pany for our local fuel.

7 We reached an agreement with them on a rate which was  
8 agreeable to both of us, but they insisted that the agreement  
9 provided for a take-or-pay provision. This means that you pay  
10 for the gas whether you use it or not, and therefore, if we  
11 had had a nine-months' strike, as we did a few years later, we  
12 would have been paying the gas company millions of dollars for  
13 gas we didn't use.

14 They also insisted on a long-term contract. The  
15 Management of the company in New York refused to accept that  
16 gas contract because of the take-or-pay provision and the long  
17 term. That is all in the documents. And so they continued  
18 some more to negotiate with people for coal.

19 Now if I might digress for a moment, we are up in  
20 1963, and Edmund Guggenheim had written the President of the  
21 company saying that copper mines are being depleted; for our  
22 depreciation, we are generating money, we ought to invest it  
23 somewhere, and it is true the company felt they had to make an  
24 investment and they considered a number of areas where they  
25 might invest, and No. 1 on their list was oil.

1           Now the money they had to invest resulted from  
2 several sources:

3           First, they were depreciating their copper mines,  
4 but in spite of spending \$7 million a year for exploration,  
5 they had not found a new copper mine in 50 years.

6           Further, they had owned a very large interest in  
7 Kaiser Aluminum, which they were in the process of selling, and  
8 this would generate a lot of money.

9           Third, they were selling the Okonite Corporation,  
10 which was a processing company, and it would generate a lot of  
11 money. And I might add that in those days, they were in trou-  
12 ble with their foreign copper mines in Chile, and in 1967, the  
13 Government of Chile asked us to sell them 51 percent of the  
14 mine for some paper, and on last Saturday, a President was  
15 elected in Chile who campaigned on the platform that among his  
16 first acts would be to nationalize the copper industry.

17           Now recognizing that we wanted to do something we  
18 didn't know how to do, and recognizing that our first thought  
19 was an oil company, we went to Booz, Allen, who are well-known  
20 management people, and we said, "We want you to hire a man who  
21 can tell us whether we ought to go into the oil business, and  
22 if so, how to do it."

23           With Booz, Allen's help, Kennecott hired a man named  
24 Fisher, Gordon Fisher, and he promptly went to work, and he  
25 first concluded that if Kennecott wanted to go into the oil bus-

1 business, they should make no attempt to do it "grass roots"  
2 -- this would be unsuccessful. He wrote a long report, it took  
3 him almost a year to write it, in which he concluded that it  
4 would be prudent for Kennecott to try to buy a medium-sized oil  
5 company.

6 That report is dated July 6, 1964. It is Commission  
7 Exhibit 11, and it makes clear that Kennecott's objective was  
8 not to spend two or three or twelve million dollars starting a  
9 little oil company and building it up over a 50- or 30- or  
10 20-year period, but its objective was to find a home for some-  
11 thing in the order of \$500 million to a billion dollars.

12 And on the basis of that report, the Board of Direc-  
13 tors on July 17, 1964, authorized the Management of the company  
14 to buy a medium-sized oil company for up to \$700 million.

15 For the next year and a half, Kennecott's thought of  
16 diversifying and investing this surplus money was devoted to  
17 buying an oil company. In that next year and a half, they were  
18 actively engaged in negotiating with almost every medium-sized  
19 oil company in the country, and to the extent that they were  
20 acquisition-minded, their energies were devoted to buying an  
21 oil company for something like \$700 million.

22 Now if we go back again to 1963, Mr. C. D. Michaelson,  
23 who was the No. 2 man in the company, the Executive Vice Presi-  
24 dent, wanted to get himself some education on coal. Coal was  
25 also one of the items that was on the list behind oil, that

1 they might ultimately go into, and in April of 1963, he wrote  
2 a letter to his local man in Salt Lake, saying: "I want you  
3 to make me a study of the coal industry, and I want this to be  
4 a nationwide study, a big study, on whether coal is feasible  
5 for us."

6 In the ensuing months it became clear that the peo-  
7 ple in Salt Lake, either deliberately or otherwise, were inter-  
8 preting that request as a local study for coal for Utah boilers.  
9 And so on July 15, this Management man in New York wrote Salt  
10 Lake, and I quote from the letter:

11 "I get the impression that you are localizing your  
12 efforts in the Utah area and restricting your investigations  
13 to the coal requirements of Utah Copper Division and Nevada  
14 Copper Division. Please bear in mind that we are interested  
15 in a comprehensive study of the coal potential in the entire  
16 West, and possibly in the entire United States."

17 And then there was some more foot-dragging, and some  
18 more letters from New York say, "Now we told you what to do;  
19 let's do it."

20 And on October 22, the manager in Salt Lake writes  
21 his boss in New York, and this is Commission Exhibit 25, and  
22 he says, and I quote:

23 "Our thoughts here are that the methods known to us  
24 for estimating long-term future coal markets have become in-  
25 creasingly hazardous, because of the new exploration, production,

1 and distribution concepts, and resulting major discoveries and  
2 changes in the oil and gas competition, for both national and  
3 international fuel markets; that neither our present personnel  
4 nor any outside consulting firms known to us could provide the  
5 kind of long-range market and evaluation study which would  
6 make us feel sufficiently certain of the potential of the coal  
7 business to justify recommending a major capital commitment;  
8 and last, but perhaps most to the point, it is our thought that  
9 if Kennecott is interested in becoming a major producer in the  
10 proximate future, the most certain approach would be to acquire  
11 a sound major coal company with good reserves, having low  
12 operating cost potential and with an effective marketing orga-  
13 nization."

14 Now their evidence both oral and documentary is that  
15 after this letter came from Salt Lake to New York, New York  
16 recognized that the Salt Lake people were incompetent to make  
17 the kind of educational study they wanted, and no further  
18 attempt was made to press them on that point.

19 As Mr. O'Malley has said, in 1964 we took an option  
20 on this Knight-Ideal mine in Carbon County, Utah.

21 COMMISSIONER DIXON: How does that jibe with just  
22 what you said?

23 MR. SIMON: Because, Commissioner Dixon, we still had  
24 this fuel problem, we needed fuel for our own boilers, and we  
25 were trying to beat the gas company down into a lower rate.



1           And the documentary evidence will show that we bought  
2 the Knight-Ideal property as a hedge against gas prices, and I  
3 would like to develop that on the document, if I may.

4           The Knight-Ideal property is located in Carbon County,  
5 Utah, and it is fair to say that it is the worst coal-mining  
6 location in the whole United States for a mine. Complaint  
7 Counsel called as a witness a man named Joseph Turner, who is  
8 the Chief of the United States Government's Bureau of Mines  
9 Federal Coal Leasing Project. He was the Government's witness  
10 in this case, and he testified that Carbon County, Utah, was  
11 the last place in the United States that one would go to open  
12 a coal mine.

13           Our people considered it only because it was close to  
14 our Bingham Canyon Project and could be suitable for coal at  
15 our Bingham Canyon properties.

16           On May 28th, the people out West wrote a report to  
17 New York, and it is a big report, 35 - 40 pages long. It is a  
18 document frequently cited by Complaint Counsel, his exhibit,  
19 and it says, "We recommend that you exercise this Knight-Ideal  
20 coal property option and take on the going business as a mine."

21           And had we exercised the option then existing, we  
22 would have acquired a coal mine producing 185,000 tons a year,  
23 with the employees capable of mining the coal and producing the  
24 coal for that amount, and the Western people recommended to  
25 New York doing that.

1 I would like to read to you the reason for their  
2 recommendation, because this is a document written in 1965, not  
3 during the trial. It says: "It is recommended that Kennecott  
4 exercise the option with the Knight-Ideal Coal Company for the  
5 following reasons:

6 "One, to obtain a long-term fuel reserve at an esti-  
7 mated cost of 2.57 to 3.21 cents per ton, of proven recoverable  
8 coal, for protection against future excessive price increases  
9 in purchased natural gas, and the decreasing natural gas re-  
10 serves controlled by Mountain Fuel Supply Company and being  
11 depleted to supply the growing domestic and smaller industrial  
12 users of firm gas.

13 "Second reason: to obtain a reserve as a base in  
14 developing potential outside coal markets, with the expectation  
15 of obtaining enough commitments to permit a profitable coal  
16 operation.

17 "Three, to supply coal to the Utah Copper Division  
18 new boilers, and the Nevada Mines Division, even without outside  
19 sales in large volume, if"-- and I emphasize the "if" --  
20 "further engineering and economic studies are found to confirm  
21 the preliminary findings in this report."

22 And then they list a number of items which they say  
23 should be pursued if Management decided to adopt this recommen-  
24 dation. And I should say to you that not one of those addi-  
25 tional matters was ever pursued.

1           On page 27 of the same document, they recommend an  
2 alternate plan, and the alternate plan is merely to acquire the  
3 reserves as a hedge.

4           COMMISSIONER DIXON: Can you point out those things,  
5 those alternate things, which were never pursued? Subsequent  
6 to this, the purchase of Peabody was made, was it not?

7           MR. SIMON: No, sir; this document was written in  
8 May 1965.

9           COMMISSIONER DIXON: I know. That is correct. And  
10 you said that -- you read the main points and you said, "some  
11 alternate points, which were never pursued."

12           MR. SIMON: No, sir. I am sorry, Commissioner Dixon.  
13 I said that the three recommendations were followed by a list  
14 of items which should be done. Not alternate -- should be done,  
15 if the recommendations was adopted. And none of those things  
16 were ever done. Then, at the end of the report --

17           CHAIRMAN KIRKPATRICK: What kind of thing is that?  
18 What are these recommendations?

19           MR. SIMON: The first one is to continue operating  
20 the present mine until the existing coal contracts inherited  
21 under the operation are completed. This was not done.

22           Secondly, apply for leases on unleased U. S. lands  
23 bordering the property on the north. This was not done.

24           Recruit and engage a man to actively develop the out-  
25 side sales necessary to sustain a profitable annual rate of

1 production from the mine. This was not done.

2 COMMISSIONER DIXON: Wasn't there an offer made for  
3 those lands?

4 MR. SIMON: No, sir.

5 COMMISSIONER DIXON: I thought there was.

6 MR. SIMON: There was an offer made for some other  
7 coal land.

8 COMMISSIONER DIXON: Not these, particularly.

9 MR. SIMON: Not these lands.

10 Now the alternate proposal was just to acquire the  
11 reserves as a hedge against coal prices.

12 Now that document was sent to New York with a trans-  
13 mittal letter, and the transmittal letter is dated June 10, 1965.  
14 This is 1965, five years ago. And it says: "The Knight-Ideal  
15 property should be purchased for the following reasons:

16 "One, the acquisition of this ample high-grade coal  
17 reserve will provide Kennecott with a most desirable defensive  
18 reserve against higher future prices for other fuels, particu-  
19 larly higher priced natural gas for the Utah Copper Division;

20 "Two, the Knight-Ideal coal property is one of the  
21 most desirable low-cost steam coal reserves in the Inter-Mountain  
22 area, and if nothing else, the property should appreciate in  
23 value with the passage of time;

24 "Three, under the minimum operating conditions, sup-  
25 plying only 400,000 tons of coal per year to Utah Copper

1 Division and Nevada Mines Division, the property can carry  
2 itself;

3 "Four, if the property is acquired to be held only  
4 as a reserve, the shut-down costs are low, amounting to an  
5 estimated \$36,000 for the first year to close the property and  
6 \$11,000 per year thereafter to hold it."

7 And now, No. 5, I think is most significant, and I  
8 read No. 5 to you:

9 "It is believed that Kennecott can organize to pro-  
10 duce commercial coal as efficiently and cheaply as the present  
11 national major producers, and the Knight-Ideal property as a  
12 base can become a significant competitor for the coal business  
13 in the Inter-Mountain and Northwest United States."

14 "It should be noted at this point that competitive  
15 coal must be produced with an extremely tight organization,  
16 resulting in high productivity for the total employment. All  
17 production and cost data, conclusions, and the recommendations  
18 herein are based on this premise."

19 Now what is significant about that paragraph is that  
20 when the Management in New York sent this data to the Board of  
21 Directors, they deleted that paragraph. They didn't delete it  
22 during the trial or after the trial. They deleted it in June  
23 1965. And they deleted it because they didn't believe it.  
24 They thought it was an unsound and untenable position.

25 CHAIRMAN KIRKPATRICK: Was there testimony to that

1 effect?

2 MR. SIMON: Yes, sir.

3 Now the fact is that when New York got this recom-  
4 mendation, to exercise the option, they rejected it. There  
5 can't be any doubt about it. They rejected it. And New York  
6 said: "All we will let you do is buy those reserves as a  
7 hedge. We will let you get those reserves to protect us against  
8 rising fuel costs."

9 And the contemporaneous documents that support what  
10 I say are: first, they had to renegotiate a new contract with  
11 Knight-Ideal, because the existing option contract called for  
12 buying a going mine. The new contract, which was written in  
13 June 1965, called for the old Knight-Ideal people to shut the  
14 mine down, to seal the mine, to discharge the workers, to  
15 clean up their old contracts, and for us to get solely reserves.

16 Secondly, we put out a press release when we acquired  
17 the property, and the press release is in evidence as CX-69,  
18 and it says that we bought these reserves, as a Kennecott  
19 spokesman confirmed that Kennecott had contracted to buy the  
20 coal reserves from Knight-Ideal, noting Kennecott's continuing  
21 needs for low-cost sources of fuel and power.

22 And then, and I think this is quite important in view  
23 of the position taken that we could have gone into a mine, the  
24 miners came to us and the miners said, "Gee, whiz, don't fire  
25 us. Keep this mine going and let us find a place to work."



1           We said, "No, we can't do that"; and they said,  
2       "Well, won't you have your Management reconsider?" And so our  
3       man said, "Yes, we will talk about it, and we will write a  
4       letter."

5           And on August 4, 1965- Kennecott, on authority of  
6       the Management of the company, wrote this letter to the Union  
7       representing the workers in the mine, and it says in part, and  
8       I quote:

9           "On the first question, and perhaps the most person-  
10      ally important to you, we can't alter our original plans. We  
11      can't continue or commence production immediately after the  
12      Knight-Ideal interests leave the property, nor can we foresee  
13      a date in the future when we might start production.

14           "Our purchase of these mining properties was for the  
15      express purpose of acquiring coal reserves. For this reason,  
16      then, we can't entertain our other production proposal, namely,  
17      to permit production on a lease basis by the former supervisor  
18      of Knight.

19           "On the last question we want you to know that we  
20      are aware of the limited future employment opportunities in  
21      your community. Therefore, if you or any other hourly-paid  
22      employees at the mine are interested in working at Kennecott's  
23      Western properties, we will accord you preferential hiring  
24      treatment at those properties."

25           Now the testimony is, by a man named Heiner, who is

1 acknowledged by Complaint Counsel's expert to be one of the  
2 great experts in coal in the country, and Heiner has lived in  
3 Utah all his life, that when Kennecott bought this mine, the  
4 Knight-Ideal property, he knew they had no interest in going  
5 into a coal mine, mining the coal.

6 He knew they bought it -- and his words were, "as  
7 fuel insurance." And then the man from the gas company in  
8 charge of rates testified, and he was accompanied by the Presi-  
9 dent of the company, who later substantiated his testimony, and  
10 the gas company man said, when he learned Kennecott had bought  
11 these reserves, he knew that he would have to sharpen his  
12 pencil and give Kennecott a better fuel price. He said he knew  
13 Kennecott didn't want to convert from gas to coal -- we were  
14 then using gas -- but he knew that unless he gave us a good  
15 rate, we would have to do it.

16 And his testimony is that beginning in November of  
17 1965, we began negotiating a new rate with the gas company, and  
18 we subsequently got a rate from the gas company which was  
19 almost identical to the one they had offered us in 1962, but  
20 it did not have any take-or-pay provision, it did not have any  
21 long-term provision, and it did not include the intervening  
22 rate increases which other people had been required to pay.

23 COMMISSIONER DIXON: Mr. Simon, ---

24 COMMISSIONER MAC INTYRE: Mr. Simon, taking all of  
25 the argument that you have just advanced on this point, I would

1 like to ask how that may be reconciled by us with the finding  
2 of the Hearing Examiner commencing at the bottom of page 141  
3 of the Initial Decision, in which he points out the letter of  
4 September 13, 1965.

5 The letter confirms an arrangement for Booz, Allen  
6 (quote) "to undertake to search for a senior executive to lead  
7 Kennecott into the coal business."

8 Then he goes on, the top of the next page, specifying  
9 that this man should be "technically qualified, but with exper-  
10 ience in marketing"; and with a salary up to \$75,000 a year.

11 How are we to reconcile that finding with what you  
12 have been telling us here?

13 MR. SIMON: Commissioner MacIntyre, I said ten or  
14 twelve minutes ago that we had to separate Kennecott's quest  
15 for solving its local fuel problem from Kennecott's quest for  
16 diversification, buying another business. I told you earlier  
17 that when we were actively seeking an oil company, we went out  
18 and went to Booz, Allen and we said to them, "You get us an oil  
19 man who can evaluate our getting into the oil business."

20 COMMISSIONER MAC INTYRE: This is a coal man I am  
21 talking about.

22 MR. SIMON: Yes, sir. Now when we were at the point  
23 when it looked like we couldn't find an oil company, and we had  
24 to give up on an oil company, we then went to Booz, Allen and  
25 we said, "Now we would like to consider going into the coal

1 business; can you find us a coal man?"

2 And what we were looking for in 1965 at Booz, Allen,  
3 with a coal man, is exactly the same thing we were looking for  
4 in 1963 with Booz, Allen for an oil man. We wanted an oil man  
5 to help us determine whether we should get into oil. We now  
6 wanted a coal man to help us determine whether to get into the  
7 coal business.

8 We weren't talking about hiring this man to start  
9 grass roots. We were talking about hiring a man like Gordon  
10 Fisher for oil, who could evaluate the oil business for us.  
11 And Complaint Counsel said, and I think most improperly, that  
12 because that document says he should be a man capable of running  
13 a company with \$200 million a year of sales, that we planned  
14 to start a de novo company and get to \$200 million a year in  
15 sales.

16 All that document says, we wanted a first-rate man,  
17 so that if we decided to go into the coal business, and if we  
18 bought a coal company, he would be the man to run it, but the  
19 search for that man was a part of our attempt to diversify and  
20 invest our money somewhere, and it had nothing to do with our  
21 fuel problems in Utah.

22 The man who wrote that letter was a witness on the  
23 stand, and he testified he didn't even know about the Knight-  
24 Ideal property. He didn't even know about this Western matter  
25 that I have been telling you about.

1 COMMISSIONER MAC INTYRE: Well, this letter was writ-  
2 ten prior to the consummation of the Knight-Ideal purchase,  
3 wasn't it?

4 MR. SIMON: No, sir. The Knight-Ideal purchase ---

5 COMMISSIONER MAC INTYRE: What is the timing on that?

6 MR. SIMON: The Knight-Ideal purchase was consummated  
7 in June, and that letter was written in September.

8 COMMISSIONER MAC INTYRE: And how much after this  
9 was it that the purchase of Peabody took place?

10 1 MR. SIMON: The first negotiation with Peabody was  
11 the following April, and the first interim agreement ---

12 COMMISSIONER MAC INTYRE: So it was about four or  
13 five months before the purchase of Peabody, six months.

14 MR. SIMON: Well, the first agreement was the follow-  
15 ing June, some nine months later, but there were discussions  
16 in April. But in the intervening period, Commissioner MacIntyre,  
17 the record is undisputed that Booz, Allen tried to find us a  
18 coal man, and after three months of search they came to us and  
19 said, "We just can't find you a coal man; there isn't anybody  
20 available."

21 COMMISSIONER MAC INTYRE: You would have to buy a  
22 company in order to get such a man.

23 MR. SIMON: And then we looked at a couple of little  
24 companies, and for reasons partly commercial and partly other-  
25 wise, we didn't care to buy any of those companies.

1 But there is a great deal of evidence in this record,  
2 all undisputed, that because most people, and I think I share  
3 this view, and I think you probably would have in the middle  
4 '50s, where everybody thought the coal business was a dying  
5 business and no one wanted to get into the coal business, as a  
6 result, the mining schools almost closed down their coal depart-  
7 ments, and there were no young people wanting to learn the coal  
8 business, and getting coal people was almost impossible.

9 And so by the end of the year we gave up the Booz,  
10 Allen project of finding a coal man to help us evaluate the  
11 project. And then I have got to go back again in October --  
12 and this is all in writing -- in October of 1965, our people  
13 made some more determinations as to whether it would be eco-  
14 nomic to convert our boilers out West from gas to coal, and  
15 these proved that they would not be economic.

16 And in November and December, and there are many doc-  
17 uments that support this, Commissioner MacIntyre, in November  
18 and December of 1965, the decision was made that it would not  
19 be economic to convert the boilers from gas to coal.

20 They then went back to negotiating with the gas com-  
21 pany on a new contract, and even Complaint Counsel has admitted  
22 in his brief below that by the end of 1965, any attempt to con-  
23 vert the Utah boilers from gas to coal had been abandoned; and  
24 every document -- there is not one exception, sir -- every  
25 document that deals with these Western coal studies is based on



1 the assumption of converting our own boilers in Utah to coal.

2 COMMISSIONER DIXON: Now that is a very crucial  
3 point.

4 MR. SIMON: Yes, sir.

5 COMMISSIONER DIXON: Right there, you see, your con-  
6 tention would seem to me, your argument, is that whether it  
7 was real or for positioning and arguing about a rate, you went  
8 through all these transactions that are involved here.

9 Complaint Counsel over here makes a different point,  
10 it seems to me. He feels that maybe that was one of your  
11 reasons, but there was another reason. All of the studies and  
12 evaluations, and you are talking about developing enough of a  
13 production to perhaps bid realistically on new steam plants  
14 and even to the West Coast, then we are talking about a narrow  
15 period, when the record then picks up and you go to talking to  
16 Peabody; well, once you get serious with Peabody, all this  
17 other reserve and everything becomes insignificant, because  
18 here is Peabody there already.

19 MR. SIMON: Let me put that in perspective, if I may.

20 COMMISSIONER DIXON: I wish you could, because right  
21 in here is a very crucial point.

22 MR. SIMON: Yes, sir, it is certainly very important.

23 The Western Mining Division people in Salt Lake, in  
24 every document they wrote, presupposed that we would convert  
25 our own boilers from gas to coal. Now I concede immediately--

1 COMMISSIONER DIXON: Now that isn't all that they  
2 talked about.

3 MR. SIMON: No, sir.

4 COMMISSIONER DIXON: Because we have read these doc-  
5 uments, too.

6 MR. SIMON: I concede that.

7 COMMISSIONER DIXON: They were seeing a developing  
8 position in the coal business in the Western Region, as I read  
9 it.

10 MR. SIMON: Commissioner Dixon, I concede immediately  
11 that they also talked about outside sales to others.

12 COMMISSIONER DIXON: Yes.

13 MR. SIMON: But the fact remains that every document  
14 was based on the assumption that we are going to convert our  
15 own boilers to coal, and we are going to start with our own  
16 demand for coal, and over and above that demand, we are going  
17 to make some outside sales. No document was ever written which  
18 ever even suggested selling any coal to anybody except over and  
19 above our own demand.

20 COMMISSIONER DIXON: But in this setting we talk  
21 about, we talk about a company that for one reason or another  
22 has got a lot of cash.

23 MR. SIMON: Yes, sir. But may I finish answering  
24 your prior question, sir? The basis of all these studies was  
25 converting from gas to coal. And the Western Mining people

1 wanted to go on also and sell some coal, but Management in New  
2 York turned that down. This is important to us. Management  
3 in New York rejected it, and said, "Shut the mine down. Just  
4 buy the reserves."

5 COMMISSIONER DIXON: But after that decision, if I  
6 am not incorrect, there are documents that indicate there was  
7 still some study in feasibility going on in this interim period,  
8 at the time you started the discussion with Peabody. It wasn't  
9 just finished and washed up.

10 MR. SIMON: The timing on that, Commissioner Dixon,  
11 and there can be no doubt about this, and I am sure Complaint  
12 Counsel will not dispute the dates I am about to give you, we  
13 bought the Knight-Ideal reserves in June 1965.

14 COMMISSIONER DIXON: Yes.

15 MR. SIMON: Finished the deal in July 1965.

16 In October and November, we made some further studies  
17 on the feasibility of converting from gas to coal. And by the  
18 end of 1965, the suggestion of converting from gas to coal had  
19 been irrevocably rejected. That project was dead. There was  
20 no thought of converting from gas to coal.

21 And when that project died, Knight-Ideal died, and  
22 we did not have our first discussion with Peabody until the  
23 following April.

24 COMMISSIONER DIXON: You are saying there is no paper,  
25 nothing written in the record, or any statements, that indicate

1 that between that time when you are saying the final reports  
2 and the consideration in New York that this is dead, Knight-  
3 Ideal is dead, that nothing was going on, a reevaluation of  
4 anybody by engineering studies, thoughts, or anything anywhere?

5 MR. SIMON: I am saying to you that the last document  
6 in the record on coal is the bids for the Wasatch-Patoc  
7 property, which is, I believe, December 3, 1965. And after  
8 that date there is absolutely no scrap of paper suggesting any-  
9 body was considering converting from gas to coal, or doing any-  
10 thing with the Knight-Ideal property, and that is four months  
11 before we had our first conversation with Peabody.

12 COMMISSIONER DIXON: Now from that point, why wasn't  
13 it potentially available for the company to do it?

14 MR. SIMON: To do what, sir?

15 COMMISSIONER DIXON: To go into the coal-mining busi-  
16 ness, we might say, with the beginning of the Knight-Ideal  
17 properties and others they might have acquired in the Western  
18 Region?

19 MR. SIMON: Well, in the first place, as I have said  
20 earlier, Knight-Ideal was an impossible place to start a coal  
21 business.

22 COMMISSIONER DIXON: Well, that's your statement.

23 MR. SIMON: No, sir, it is the testimony of some  
24 eight witnesses, who are probably the most knowledgeable people  
25 in the United States on coal. This includes the manager of

1 the U. S. Steel coal mines, right next door, the manager of the  
2 Kaiser mines, right next door, the Kerr-McGee coal mine, who  
3 testified he looked these mines over, the coal man who testi-  
4 fied for Complaint Counsel ---

5 COMMISSIONER DIXON: You want me to believe that they  
6 just sunk \$6-1/2 million down a coal-hole?

7 (Laughter.)

8 MR. SIMON: No, sir. Three-quarters of a million  
9 dollars is all the money we ever spent, and we got it back  
10 handsomely, because we negotiated a new contract with the gas  
11 company.

12 COMMISSIONER DIXON: Oh, yes.

13 MR. SIMON: That saves us far more than that three-  
14 quarters of a million dollars, and when the gas company went  
15 before the Public Utilities Commission of Utah, to get the  
16 Commission to approve the new gas rate ---

17 COMMISSIONER DIXON: Who made the recommendation to  
18 spend the 6-plus million dollars?

19 MR. SIMON: The proposal to the Board ---

20 COMMISSIONER DIXON: Proposal to the Board.

21 MR. SIMON: -- included \$6.2 million for a coal mine,  
22 if -- if they ever decided to open the coal mine.

23 COMMISSIONER DIXON: All right.

24 MR. SIMON: But the only money of that \$6.2 million  
25 that was ever spent was the three-quarters of a million dollars.

1 They never spent another dime.

2 COMMISSIONER DIXON: All right.

3 COMMISSIONER JONES: Counsel, let me ask you a ques-  
4 tion on this point. You quoted to us, or referred to the  
5 testimony of the gas company, and I think it was Mr. Turner or  
6 the Bureau of Mines, confirming your interpretation that you  
7 were only interested in Knight-Ideal as a hedge on your gas  
8 contract.

9 Now you just referred to six or eight coal witnesses  
10 who confirmed these coal reserves and the mine were in terrible  
11 condition and the worst in the United States.

12 Over against that, I am trying to weigh in my mind  
13 the reaction of both Peabody and Island Creek when Kennecott  
14 was taking these steps with an eye to Ideal; both of whom, as  
15 I read the documents referred to in the briefs, were exceedingly  
16 concerned at the prospect of Kennecott Copper coming in as a  
17 competitor, who I would have assumed, if they had known or  
18 believed that these properties were worthless and useless,  
19 wouldn't have been so concerned.

20 Instead, Island Creek apparently comes and offers a  
21 joint venture, Peabody comes and tries to make some kind of  
22 agreement with Kennecott to forestall it from entering the  
23 coal business.

24 Now I can't square those two reactions with the other  
25 testimony that you have referred us to.



1 MR. SIMON: The record is unequivocal that Peabody  
2 had entered into a contract with Nevada Power Company to supply  
3 them with coal, and Peabody had no coal-mine out of which they  
4 could supply that contract. Peabody's only interest in Kenne-  
5 cott was to sell Kennecott coal, so that ---

6 COMMISSIONER JONES: That is right. They didn't want  
7 Kennecott to go into the business, apparently.

8 MR. SIMON: May I finish, please? Peabody's only  
9 interest in Kennecott was to sell it coal, so that the combined  
10 Kennecott requirements and Nevada Power requirements would  
11 justify the opening of a mine by Peabody.

12 Kennecott found, and this is in the documents, that  
13 they could buy the coal cheaper from Peabody than they could  
14 mine it themselves. But they also found that it was still  
15 cheaper to stay with gas, and so they never converted. And  
16 when they didn't convert their power plant from gas to coal,  
17 that was the end of the project.

18 Now so far as Island Creek is concerned, their partner  
19 in the deal was Heiner.

20 COMMISSIONER DIXON: Because that forever queered the  
21 Knight-Ideal thing, because after you bought Peabody, who had  
22 production facilities in that area ---

23 MR. SIMON: No, sir.

24 COMMISSIONER DIXON: -- where you could buy coal --  
25 Weren't there some Peabody facilities in the West at all?

1 MR. SIMON: No, sir.

2 COMMISSIONER DIXON: They had no mines and no pro-  
3 duction?

4 MR. SIMON: No, sir, not at that time.

5 COMMISSIONER DIXON: Not at that time?

6 MR. SIMON: And they still don't have production any-  
7 where near our Utah power plant.

8 COMMISSIONER MAC INTYRE: What is the nearest?

9 COMMISSIONER DIXON: That is the question. There  
10 are some there, because you just made a statement they found  
11 it cheaper to buy it than it would be to develop it.

12 MR. SIMON: Peabody now has a mine at Black Mesa in  
13 New Mexico. But this is far removed from our copper mine, and  
14 in no event could it supply our copper mine, but even that  
15 mine didn't open until this year. It was not opened during  
16 the time of the trial.

17 COMMISSIONER DIXON: Well, I am trying to search my  
18 memory. Didn't Peabody at that time own some mineral rights,  
19 or reserves, in this area?

20 MR. SIMON: Yes, sir.

21 COMMISSIONER DIXON: They had it.

22 MR. SIMON: Yes, sir.

23 COMMISSIONER DIXON: And may have been more accessible,  
24 the way you describe Knight-Ideal.

25 MR. SIMON: And this is what I just told Commissioner

1 Jones. They had some reserves and they had a contract with  
2 Nevada Power, but the Nevada Power contract wasn't big enough  
3 to justify opening a mine.

4 COMMISSIONER DIXON: All right.

5 MR. SIMON: And if they could have convinced Kenne-  
6 cott to convert to coal, and sold Kennecott the coal, this  
7 would have been enough to justify opening a mine. The fact is  
8 that to this day, they have not converted.

9 COMMISSIONER JONES: Counsel has referred to a let-  
10 ter, CX-51 D, which Peabody wrote March 5, 1965, in which  
11 among other things it says, "Peabody does not want Kennecott  
12 in the coal business for either its captive requirements or  
13 outside sales."

14 Now apparently, the concern of Peabody at Kennecott's  
15 actions in the coal industry went far beyond just supplying  
16 Nevada power companies.

17 MR. SIMON: That is not true, and it is not supported  
18 by the record.

19 COMMISSIONER JONES: What is the explanation of this  
20 letter?

21 MR. SIMON: The explanation of the letter is that Ken-  
22 necott -- Peabody wanted Kennecott's boiler business, so they  
23 could have enough business to justify a mine to supply Nevada  
24 Power. And they failed to ever get us to convert our power  
25 plant, because we are still using gas.

1 COMMISSIONER DIXON: What she is referring to is a  
2 Peabody letter, not a Kennecott letter.

3 MR. SIMON: Yes, and it is Peabody who is trying to  
4 sell us coal, and ---

5 COMMISSIONER DIXON: They were. Just what the letter  
6 says. We don't have to worry what they said. It says it. We  
7 don't need an explanation. That's what it says.

8 MR. SIMON: It says they don't want us to get in the  
9 coal business.

10 COMMISSIONER DIXON: Correct.

11 MR. SIMON: And the reason they don't want us to get  
12 in the coal business is because they wanted to sell us coal,  
13 but the fact remains, Commissioner Dixon, we have never to  
14 this day converted our plant to coal, and we made the decision,  
15 and it is in writing, in the fall of 1965, not to convert.

16 And the Hearing Examiner said, and I would like to  
17 quote him, in page 189:

18 "Kennecott did not take a single implementing step,  
19 after the purchase of the reserves in June 1965, to develop a  
20 new mine. Any likelihood that it might have done so, under  
21 the foreseeable economic conditions, was eliminated by the end  
22 of 1965, when it was decided that Utah Copper Division would  
23 continue to use natural gas because it was more economical  
24 than any coal Kennecott could buy. This was several months  
25 before the beginning of the Kennecott-Peabody negotiations."

1 Now I would like to state a fact that I think is  
2 important, and that is it relates to the economics of selling  
3 coal.

4 Complaint Counsel would like to give you the impres-  
5 sion that, and the Steelworkers said, all you have to do is  
6 dig a hole in the ground and you are in the coal business.

7 First, I want to call to your attention what the  
8 demand for coal is. The red line on this chart indicates elec-  
9 tric utility purchases. It starts in 1947 and goes to 1967.  
10 The blue line indicates commercial users. The dotted black  
11 line is residential and retail uses, and the heavy black line  
12 is railroads.

13 Now you notice the railroad business is gone. The  
14 residential business is almost gone. The utility business is  
15 the coal business.

16 COMMISSIONER MAC INTYRE: What part of the total is  
17 the utility business?

18 MR. SIMON: The utility business, Commissioner  
19 MacIntyre, is 70 percent of the steam coal produced in the  
20 United States.

21 COMMISSIONER MAC INTYRE: That has been going up.

22 MR. SIMON: It has been going up, as the chart shows  
23 you. That is the only market for coal in this country today or  
24 the foreseeable future with the possible exception -- no "pos-  
25 sible"; with the exception -- that within the next five to  
26

1 fifteen years we definitely will have synthetic fuels, gasoline  
2 and natural gas made from coal.

3 This is commercially feasible today; it is not eco-  
4 nomic today. But synthetic fuels and electric power is the  
5 business.

6 Now we don't dispute that Kennecott is capable of  
7 digging a hole in the ground and taking coal out of the hole  
8 and putting it on the top of the ground. Anybody who was ever  
9 in the earth-moving business or anybody who was ever in the  
10 mining business can do that. And in that respect, every mining  
11 company and every earth-moving company in the country is a  
12 potential entrant into this business.

13 But there are two things that are more important  
14 than just digging a hole and bringing the coal out of the  
15 ground. One is mining the coal economically, in order to com-  
16 pete with other coal mines and other fuels, such as gas and  
17 oil and nuclear; and the other is being able to market it eco-  
18 nomically.

19 Now this involves six important factors. But I would  
20 like to tell you something about the time period involved.  
21 Kerr-McGee is an oil company that has gone into the coal busi-  
22 ness. They have been acquiring reserves for 12 years now.  
23 They have been building mines, they have been working on sell-  
24 ing their coal, and they have not yet sold a single pound of  
25 coal. They have acquired over a billion tons of reserves, but



1 they haven't sold a pound.

2 COMMISSIONER JONES: They are what -- an oil company?

3 MR. SIMON: They are an oil company, and they have  
4 been at it for 12 years, and they have got a mine, they are  
5 working on the mine.

6 We asked the Kee-McGee man, "Have you tried to sell  
7 any coal to utility companies?" and he said, "No, we haven't  
8 tried it yet. We are going to. We haven't tried it yet."

9 "Why haven't you tried?"

10 "Because we don't yet know what our costs are, and  
11 we can't quote a price to a utility until we know what our  
12 mining costs are."

13 Utah Construction and Mining Company, which is a new  
14 entrant in the coal business, they have been in it for 25 years  
15 and they have one customer.

16 COMMISSIONER JONES: I don't understand that last  
17 testimony. Could you explain it to me, Mr. Simon?

18 They don't know what their costs are, so they can't  
19 quote a price. I thought there was a competitive industry,  
20 and coal being a rather stable product, I would assume the  
21 price, that there was a market price that they would ship for.

22 MR. SIMON: Well, let me educate you on that, if I  
23 may, Commissioner Jones. This is about as important as you  
24 can get in the coal business.

25 Utility coal is sold on 20-, 25-, 30-year contracts.

1 Negotiations are president-to-president negotiations. It is  
2 not a buyer and a salesman in selling coal; you don't hire a  
3 salesman and send him out to call in orders.

4 When a utility company builds a plant today, they  
5 locate that plant frequently right at the mouth of the mine,  
6 and if it is not located at the mouth of the mine, it is located  
7 at a place where coal is accessible from a particular mine.

8 COMMISSIONER DIXON: Is this in the record?

9 MR. SIMON: Yes, sir, oh, absolutely, and not in the  
10 record once, Commissioner Dixon, but a dozen times.

11 COMMISSIONER DIXON: Is there anything in the record  
12 about the TVA steam plants? Does it fit your model? Talking  
13 about 30-year contracts?

14 MR. SIMON: I can't tell you how long it is, but ---

15 COMMISSIONER DIXON: Peabody supplies TVA.

16 MR. SIMON: Yes, sir.

17 COMMISSIONER DIXON: And the price went up recently---

18 MR. SIMON: Not from Peabody, it didn't, sir.

19 COMMISSIONER DIXON: It didn't?

20 MR. SIMON: As a matter of fact ---

21 COMMISSIONER DIXON: You just said, 30-year contracts,  
22 talking about TVA, one of the largest producers of electricity  
23 from steam are those steam plants.

24 MR. SIMON: Yes, sir.

25 COMMISSIONER DIXON: And they aren't under 30-year

1 contracts, are they?

2 MR. SIMON: I can't tell you.

3 COMMISSIONER DIXON: They were in trouble because  
4 they weren't.

5 MR. SIMON: But I can tell you this, Commissioner  
6 Dixon: that most of Peabody's business is under long-term  
7 contracts.

8 COMMISSIONER DIXON: Yes.

9 MR. SIMON: The very great bulk of them are in excess  
10 of ten years. And a 20- or 25-year contract frequently in-  
11 volves \$400 million worth of coal. \$400 million or \$500 mil-  
12 lion worth of coal. And you have to sign up those contracts  
13 before you have opened your mine.

14 The testimony in this record is, you don't open a  
15 mine until you have a customer. Utah Construction has two  
16 tremendous coal reserves, and for 10 years, they have been try-  
17 ing to find a customer. Not having found a customer, they  
18 haven't opened a mine.

19 So one of the horrible difficulties of this business,  
20 you sign somebody up on a 20- or 25-year contract before you  
21 have opened a mine. And projecting your costs over 25 years,  
22 or even ten years, when you have not yet produced any coal out  
23 of that mine, is a terrific problem.

24 Also, you can't use coal without water. For a steam  
25 utility plant, you must have tremendous volumes of water. So

1 you must locate your coal reserves, or find coal reserves,  
2 near a tremendous body of water.

3 Then you have transportation problems. The trans-  
4 portation is frequently as big a cost as the coal. Coal that  
5 sells for \$4 a ton may have a \$3-a-ton transportation charge;  
6 and then you have to learn about the quality of your coal,  
7 because you sell it on a BTU basis.

8 The utility doesn't say, "We will pay you X dollars  
9 a ton." They say, "We will pay you so much for a BTU."

10 And if you have a low quality BTU, you are in trouble.

11 So the tremendously important aspect of negotiating  
12 a coal contract with a utility is find a high-grade reserve  
13 close to water, in a good transportation position, and the  
14 transportation position may be either that you are near a  
15 railroad to move it to the load center, or you can get the  
16 utility to build the plant at your mine and send the power over  
17 electric wires to the load center.

18 You have got to have the water, and you have got to  
19 be able to estimate these costs before you open the mine, and  
20 the record is, it takes from six to twelve years from the time  
21 you first start negotiating for the coal reserves until you  
22 make your first delivery of coal.

23 And now we are talking about price, and I know this  
24 Commission is terribly interested in price, and consumers'  
25 effect on price, and Mr. Gottcsman talked about that; and if

1 I may, I would like to give each of you, if I may, Mr. Chairman,  
2 an exhibit that is in the record.

3 CHAIRMAN KIRKPATRICK: Incidentally, you are approach-  
4 ing the end of your time, and I do hope you are going to have  
5 an opportunity to comment on what you might call the deep-  
6 pocket aspects of the matter that was just brought up.

7 MR. SIMON: Well, I can say on that, Mr. Chairman,  
8 that there is absolutely nothing in this record on deep-pocket.  
9 There is in this record the testimony that the only money that  
10 has ever flowed from Kennecott to Peabody is a \$25 million  
11 advance.

12 And I think you can take judicial notice of the fact  
13 that a company whose assets sell for \$585 million would not have  
14 had any difficulty borrowing \$25 million from a bank. But par-  
15 ticularly is this true where you have got a \$400 million coal  
16 contract, and this \$25 million went to Black Mesa, and they  
17 have a contract in the order of a \$400 million contract. And  
18 I am sure this could have been financed with no trouble, with  
19 that volume of assets and that kind of a coal contract to back  
20 it up.

21 COMMISSIONER JONES: What was the purchase price of  
22 Peabody?

23 MR. SIMON: \$585 million.

24 COMMISSIONER JONES: That was a premium over its  
25 stock market price, wasn't it? Over 50 percent of the stock

1 price?

2 MR. SIMON: Well ---

3 COMMISSIONER JONES: What was the premium?

4 MR. SIMON: Well, it was about the same as its stock  
5 market price had been a year and a half earlier, but within  
6 the year and a half between the purchase and the year and a  
7 half earlier, the stock market price had declined from \$47 a  
8 share to \$31. This was occasioned by the belief that nuclear  
9 was about to put coal out of business. And so there was the  
10 main reason that the Peabody people wanted to sell out.

11 COMMISSIONER JONES: So Kennecott paid what -- roughly  
12 over 50 percent premium for the stock.

13 MR. SIMON: Well, we paid what the stock had been  
14 selling for 18 months earlier.

15 COMMISSIONER JONES: Yes, but that was roughly 50 per-  
16 cent premium.

17 MR. SIMON: Thirty-one to forty-seven.

18 COMMISSIONER JONES: Whatever it was, my mathematics  
19 is poor, does the record show anything as to the rationale that  
20 Kennecott used to pay that kind of a premium for the company?

21 MR. SIMON: Yes, ma'am.

22 COMMISSIONER JONES: How did they plan to recoup it?

23 MR. SIMON: They considered the earnings and potential  
24 earnings for the company, and Kennecott had failed in the oil  
25 business; we think the coal business is going to go up and that



1 the utility business is going to go up, and that we can supply  
2 coal competitively with nuclear and gas and oil.

3 COMMISSIONER JONES: Does this give us some idea of  
4 how they viewed the competitive state in this market, if they  
5 thought they could recoup that kind of premium?

6 MR. SIMON: No, ma'am. This market is the most  
7 fiercely competitive market you can imagine.

8 COMMISSIONER JONES: Well, then, how are they going  
9 to recoup it? They weren't going to lower prices, I assume.  
10 What are they going to do? How were they going to raise their  
11 money?

12 MR. SIMON: By selling coal at a profit. That is the  
13 way people make money in this world.

14 COMMISSIONER JONES: Does that indicate that Peabody  
15 had not been selling it at a profit?

16 MR. SIMON: No, ma'am.

17 COMMISSIONER JONES: I thought they were getting 10  
18 or 11 percent returns on their investments?

19 MR. SIMON: I have told you a minute ago, that the  
20 reason the Peabody stock went down is that the stock market  
21 investors believed that nuclear was going to put coal out of  
22 business, and solely on that basis the stock went down.

23 COMMISSIONER DIXON: Oh, it might have gone down for  
24 a hundred reasons.

25 MR. SIMON: This is the testimony, sir.

1 COMMISSIONER DIXON: That is still a guess. Not  
2 anybody can tell me why the stock market goes up and down.

3 MR. SIMON: What I would like to show you here, if  
4 I may, is in 1949, 1948, the price of coal at the mine was  
5 \$4.99 a ton. By 1957, it had gone up to \$5.08 a ton. The  
6 right-hand column, the extreme right-hand column, is the FOB  
7 price of coal.

8 And you will notice it is \$5 to \$5.10 a ton in the  
9 period 1948 to 1957. Between 1957 and 1967, the price of coal  
10 went down 46 cents a ton. In the same 10 years, the labor  
11 cost, which is the first column, went up 83 cents an hour.  
12 So that in that 10 years ---

13 COMMISSIONER DIXON: Wait, don't stop. Talk about  
14 what technology did. It doubled the production of the mines.

15 MR. SIMON: That is correct.

16 COMMISSIONER DIXON: Don't forget that.

17 MR. SIMON: The only way, Commissioner Dixon, you  
18 can increase wages 83 cents an hour and still reduce the prices  
19 46 cents a ton, is by increased technology, and this is ---

20 COMMISSIONER DIXON: And you come out ahead.

21 MR. SIMON: And this is the thing that is ---

22 COMMISSIONER DIXON: You come out ahead every time.

23 MR. SIMON: This is the thing that saved the coal  
24 industry from disaster. In 1955, the coal industry was a  
25 dying business. And they turned it around, with great

1 technological improvements. Now I would like to ---

2 COMMISSIONER DIXON: I would congratulate Kennecott  
3 for having the perception to know that the coal industry  
4 wasn't dead.

5 MR. SIMON: One point I would like to make in my  
6 remaining two minutes, I would like to talk about concentra-  
7 tion. This is a low-level concentration industry, and we have  
8 a Vanderbilt University Professor to prove it.

9 COMMISSIONER MAC INTYRE: Now when we are talking  
10 about concentration, as you are right now, we are talking  
11 about concentration in production and sales, and not in reserves.  
12 Is that understood?

13 MR. SIMON: Well, I would like to talk about it in  
14 both ways, Commissioner MacIntyre, but the evidence of the  
15 Commission's own economist, Mr. Folsom, was that on production  
16 this was ---

17 COMMISSIONER MAC INTYRE: That's what I say. It is  
18 on production and sales.

19 MR. SIMON. Not on reserves; on production and sales.  
20 though, this industry was relatively low in concentration.

21 The fact is that the top eight companies have less  
22 than 40 percent of the market. The Hearing Examiner found  
23 that there were 68 groups of companies producing more than a  
24 million tons of coal a year, and this has been constant for the  
25 last 10 years, and does not include the oil companies who are

1 moving into the business.

2 If you include, as people in this business, the oil  
3 companies, the railroads, and the utilities, who own tens of  
4 billions of tons of reserves, and they didn't buy them just to  
5 put them in their safety deposit vault, those people are all  
6 entrants. Most of them have their foot in the door.

7 There is a world of potential entrants in this indus-  
8 try, in the oil companies, the railroads, and the utilities,  
9 who have already invested in billions of tons of reserves.  
10 There is no concentration and no shortage of potential entrants.

11 COMMISSIONER MAC INTYRE: They are potential entrants  
12 because of the reserves they hold.

13 MR. SIMON: In the case of Standard Oil of New Jersey,  
14 for example, Commissioner MacIntyre, they don't show in our  
15 production statistics because they just started in 1967, but  
16 the record is that they own tremendous reserves, and they are  
17 already delivering coal to Commonwealth Edison.

18 Kerr-McGee has already built a mine, and is out sell-  
19 ing. Many other oil companies have not only bought reserves  
20 but have signed water contracts with the Federal Government  
21 to use those reserves in connection with the water. They have  
22 got a foot in there, already.

23 COMMISSIONER MAC INTYRE: But as I understand it, you  
24 say they are potential entrants because of these reserves.

25 MR. SIMON: And because of their water contracts and

1 because they have a special incentive, namely, synthetic fuels  
2 from coal.

3 COMMISSIONER JONES: Counsel, one question:

4 When you refer to the concentration figures, I assume  
5 that you are using those concentration figures to indicate  
6 that competition is pretty active in this industry.

7 MR. SIMON: Commissioner Jones ---

8 COMMISSIONER JONES: Now let me ask you just one  
9 question, because it bothers me from reading the briefs here,  
10 and that is, that balanced against the economic evidence of  
11 what you would call it, medium concentration, or whatever ---

12 MR. SIMON: Low-level.

13 COMMISSIONER JONES: -- low level concentration,  
14 balanced against that is the reaction of both Island Creek and  
15 Peabody to Kennecott's activities here in the coal industry.

16 They, as I read the documents, were taking very strong  
17 measures to forestall the entrance of Kennecott into this  
18 industry. They feared its competition, as far as I read these  
19 documents; they took specific affirmative action to try and  
20 discourage Kennecott from coming in.

21 Now how do I balance those documents and the reaction  
22 of the business companies in with the kind of economic evidence  
23 of low-level concentration that you are asserting here?

24 MR. SIMON: Commissioner Jones, your question might  
25 almost be "When did I stop beating my wife?" because you have

1 described documents that do not exist.

2 COMMISSIONER JONES: Well, I am just reading here:  
3 "Peabody does not want Kennecott in the coal business" ---

4 MR. SIMON: And you and I went over that.

5 COMMISSIONER JONES: "Island Creek has offered a  
6 joint venture." I don't know how else to read those documents.

7 MR. SIMON: You and I went over those documents 20  
8 minutes ago, and I told you then and I must tell you again that  
9 Peabody's only interest was they wanted to sell coal to Kenne-  
10 cott so that they could get enough business in that part of  
11 the country to justify opening a mine to supply the Nevada  
12 Power contract.

13 They had a contract with Nevada Power, and no mine  
14 with which to supply it, and that's all that is involved there.

15 CHAIRMAN KIRKPATRICK: Thank you, Mr. Simon.

16 Mr. O'Malley?

17 ORAL ARGUMENT OF J. J. O'MALLEY -- in rebuttal

18 MR. O'MALLEY: Mr. Chairman, I will try to address  
19 myself to each of the points or questions raised by the Com-  
20 missioners.

21 COMMISSIONER DIXON: Before you start, I will tell  
22 you one thing that is bothering me. I want your side now; I  
23 have heard him.

24 MR. O'MALLEY: Yes, sir.

25 COMMISSIONER DIXON: Of this nebulous gap in here.



1 You described right up to the purchase of Knight-Ideal. And  
2 then there is a few months in here when we begin to pick up  
3 documents about the purchase, looking toward the purchase of  
4 Peabody.

5 MR. O'MALLEY: Yes, sir.

6 COMMISSIONER DIXON: Now there is a gap there.

7 MR. O'MALLEY: Yes, sir. I will address myself to  
8 that first, then.

9 Kennecott bought the Knight-Ideal on June 18th; the  
10 Board of Directors voted acquisition of Knight-Ideal reserves  
11 on June 18, 1965. It was never intended by Kennecott to operate  
12 the mine that then existed on that property. The option or  
13 contract that he said was changed was not in fact changed.  
14 There was never any mention of any option contract, and they  
15 are in evidence, of a mine to be bought. Never any mention of  
16 that.

17 This document that he read, where he listed the pur-  
18 poses for which Kennecott was going to buy the Knight-Ideal,  
19 then he went down and said, "After exercising this option,  
20 here's what we should do," and he said they didn't do any of  
21 those.

22 The first one, continue operating the present mine  
23 until the existing coal contracts inherited under the option  
24 are completed. Obviously, they don't want to operate that old  
25 mine; that was a 185,000-ton-a-year mine, and they, of course,

1 were talking about a brand new one in a different canyon that  
2 we never did go to see. That's what they were talking about,  
3 a new mine.

4 COMMISSIONER DIXON: You mean your experts went out  
5 and saw the wrong hole?

6 (Laughter.)

7 MR. O'MALLEY: Mr. Dixon, if we saw a hole, we might  
8 have appreciated it, but we didn't even see a hole. All we  
9 saw was snow, and we went out there over Complaint Counsel's  
10 doubts, because they weren't planning to build a mine out  
11 there; it was in another canyon; and we all got sick.

12 Now as far as No. 2, applying for leases on adjoining  
13 coal lands, they actually made a bid, a hundred thousand dol-  
14 lar bid on coal lands adjoining the Knight-Ideal. They did  
15 that, I believe, in September or October of 1965.

16 COMMISSIONER DIXON: When he said they made a bid, but  
17 it wasn't on the adjoining ---

18 MR. O'MALLEY: It sure was. It was on the Heiner  
19 property, which adjoined it, at CX-87.

20 COMMISSIONER DIXON: On the wrong side of the canyon,  
21 I guess.

22 MR. O'MALLEY: In September. In September 1965.

23 No. 3, it says, "Recruit and engage a man to actively  
24 develop the outside sales necessary to sustain a profit at  
25 annual rates of production from the mine."

1           It was in September of 1965 that they told Booz,  
2 Allen that they had acquired properties in Utah and they wanted  
3 an executive, so they did.

4           COMMISSIONER DIXON: You heard what he said. He  
5 said they wanted him not to look at a mine, just to furnish  
6 somebody, I think, to look at it real big, on the big picture.

7           How do you differentiate from documentation or the  
8 record with respect to that?

9           COMMISSIONER JONES: He said they weren't looking  
10 for an executive to run a property; they were looking for some-  
11 body to advise them as to whether they should go to the coal  
12 business.

13           MR. O'MALLEY: That's not what the document says.  
14 The document, the CX, says Kennecott has acquired some coal  
15 properties -- I have the document here. Kennecott has acquired  
16 some coal properties and it wants to obtain an executive to  
17 lead it into the coal business.

18           But it starts on the presumption that Kennecott had  
19 acquired coal properties. That's document CX-84. So they  
20 did.

21           Don't forget, the President of the company, after --  
22 a month after -- they closed down that old mine, told his Board  
23 of Directors, "Here is what you voted for, and here is what we  
24 told you orally, that this Knight-Ideal was merely the initial  
25 step, the initial step in Kennecott's entry into the coal

1 business on a nationwide or worldwide basis. That is CX-67.

2 That is the document that the Examiner kept saying  
3 was troublesome, because it was inconsistent with Mr. Milliken's  
4 testimony. Sure, it was troublesome, and Mr. Simon didn't  
5 address himself to that document, if you notice, because that  
6 was after the Board voted to purchase the Knight-Ideal.

7 COMMISSIONER DIXON: What date is this?

8 MR. O'MALLEY: That is July 1, 1965. The Board of  
9 Directors acted on June 18, 1965. Subsequent thereto, Booz,  
10 Allen & Hamilton was retained to seek a coal executive.

11 In December, December 10, 1965, Kennecott bid on  
12 lands that were totally unrelated to the Knight-Ideal, totally  
13 unrelated to the Utah Power Plant of Kennecott Copper Corpora-  
14 tion. They bid on reserves that had water available, according  
15 to CX-92, their own document, bid on reserves there, and the  
16 President signed and authorized this, which would sustain  
17 five-million-ton-a-year production, which would be sufficient  
18 to keep --- 9

19 COMMISSIONER DIXON: What is the date of this?

20 MR. O'MALLEY: This is December 10, 1965.

21 Commissioner, this is six months after the Knight-  
22 Ideal purchase.

23 COMMISSIONER DIXON: Six months away.

24 MR. O'MALLEY: That is correct. And after, Mr. Simon  
25 said this, they had determined not to use coal at the Utah

1 Power Plant.

2 Now the fact is that Kennecott was burning coal all  
3 this time, but at their Nevada operations, and they were get-  
4 ting that coal out of Utah, and that Knight-Ideal mine could  
5 have supplied the coal for their Nevada operations, but that  
6 hasn't been mentioned.

7 Another thing; talking about the expertise in deter-  
8 mining the cost of coal, the cost of fuel, who has more than  
9 Kennecott Copper Corporation, in making that determination?

10 Kennecott Copper Corporation's Utah Power Plant is  
11 the second largest generating plant in the State of Utah; it  
12 generates enough power to feed a city of 350,000 people.

13 COMMISSIONER DIXON: In this they use ---

14 MR. O'MALLEY: They use gas with coal as a back-up  
15 fuel.

16 COMMISSIONER DIXON: Yes.

17 MR. O'MALLEY: Because it is interruptable gas.

18 And all this defensiveness is ridiculous. They were offered a  
19 lower price, before they bought Knight-Ideal and before they  
20 bought Peabody and they got water, and if Peabody isn't a good  
21 negotiating tool, I don't know what might be.

22 COMMISSIONER JONES: What were they doing between  
23 January and April, when they started negotiations with Peabody?  
24 It wasn't in the record.

25 MR. O'MALLEY: So far as I know, nothing. The Western

1 Mining Divisions had asked for exploratory help. I asked one  
2 of the witnesses, one of Mr. Simon's witnesses, if it was usual  
3 for Kennecott Copper Corporation to delay things two or three  
4 months after the request by WMD to New York, and he said, "Not  
5 the least bit unusual; sometimes goes as long as a year."

6 For example, in July of 1964, they asked for an  
7 option agreement on the Knight-Ideal property. This wasn't  
8 approved by New York until October. And in March, in other  
9 words, from December to March, December '65 to March, '66, is  
10 only a three-month period -- March '66. I am sorry. In March  
11 '66, is when they started negotiating with Peabody.

12 So they wouldn't have to do anything after this, but  
13 CX-97, which was written May 1, 1966, after the Peabody nego-  
14 tiations started, was from Western Mining Divisions to New  
15 York, and they refused to lease some of the Knight-Ideal because  
16 of the possible future large-scale operation on that property.

17 So if they had changed their mind completely, New  
18 York never told the Western Mining Divisions about it. And  
19 everything, everything mitigates against this.

20 COMMISSIONER JONES: How do you read Counsel's argu-  
21 ment that this is an industry of low-level concentration, and  
22 hence the acquisition, or even assuming that, as you put it  
23 before, that Kennecott Copper was a competitive factor, that  
24 it would be a negligible, minor competitive factor in view of  
25 the low-level concentration? What is your answer?



1 MR. O'MALLEY: First, it may or may not be a low-  
2 level concentration. The fact is, it is a rapidly increasing  
3 concentration in the industry. Peabody, more than any other  
4 company, is responsible for that increase in concentration.

5 And it was never contemplated that Section 7 should  
6 not be applied until you have an oligopoly or a monopoly in  
7 an industry. It is to stop concentration in its incipency.

8 The anti-competitive effect, as Mr. Simon didn't  
9 say, is the fact that by Kennecott going in there, there is no  
10 possibility of Kennecott deconcentrating that industry or pre-  
11 venting concentration, and I would refer the Commission to its  
12 decision in Beatrice Foods, which said that this is indeed a  
13 severe anti-competitive effect when you have dominant firms  
14 in two industries merging.

15 And as far as your question to Mr. Simon, Commissioner  
16 Jones, regarding the Peabody interest, and really fear of  
17 Kennecott's going into the coal business, CX-51, it is not a  
18 Peabody document, that is a Kennecott document, and Kennecott's  
19 man reports that Peabody's Vice President came and says, "We  
20 don't want you in the business, either for your own use or for  
21 outside sales" -- and it doesn't say anything about just their  
22 wanting to sell them coal.

23 They didn't want them selling anybody else coal,  
24 being competitive, and this is buttressed by CX-53, which is a  
25 Peabody document, written by the man who is reported to have

1 spoken to Kennecott in the Kennecott document, Hugh Lee, and  
2 he says, "The head start gained by Peabody in Utah is threat-  
3 ened by recent action and indicated action by Island Creek and  
4 Kennecott."

5 He mentioned that Island Creek had acquired some  
6 property and obviously planned to develop it, and he knew in  
7 advance that Kennecott was going to recommend three days later  
8 to New York that they purchase the Knight-Ideal.

9 And he suggested: "Let's make Kennecott an offer  
10 for their coal requirements, perhaps coupled with an offer of  
11 restricted sub-lease of part of the Huntington Corporation  
12 property" -- which was a coal-mine reserve owned by Peabody  
13 down in Huntington County, to satisfy Kennecott's desire for a  
14 defensive position, "that is attractive enough to dissuade them  
15 from acquiring and operating Knight-Ideal."

16 In other words, they didn't want Peabody in here com-  
17 peting. Island Creek didn't want Peabody in here competing;  
18 the industry recognized Peabody ---

19 COMMISSIONER JONES: You are talking about Kennecott  
20 or Peabody?

21 MR. O'MALLEY: I am sorry. Peabody didn't want Kenne-  
22 cott in. Neither did Island Creek want Kennecott in, and  
23 Kennecott didn't want Island Creek to get a competitive advan-  
24 tage over them. They refused a joint venture on the railroad  
25 spur because it would put Island Creek at a competitive dis-

1 advantage in the coal business.

2 COMMISSIONER DIXON: Well, there is a question that  
3 bothers me. I can understand perfectly well why Island Creek  
4 or Peabody didn't want a big new competitor. But the question  
5 was: Were they new or were they already in?

6 MR. O'MALLEY: Kennecott was in to this extent,  
7 Commissioner Dixon: they had acquired reserves, they had  
8 developed a mining plan for those reserves, and they were out  
9 selling coal to the larger -- trying to sell coal to the larger  
10 consumers in Utah and neighboring States.

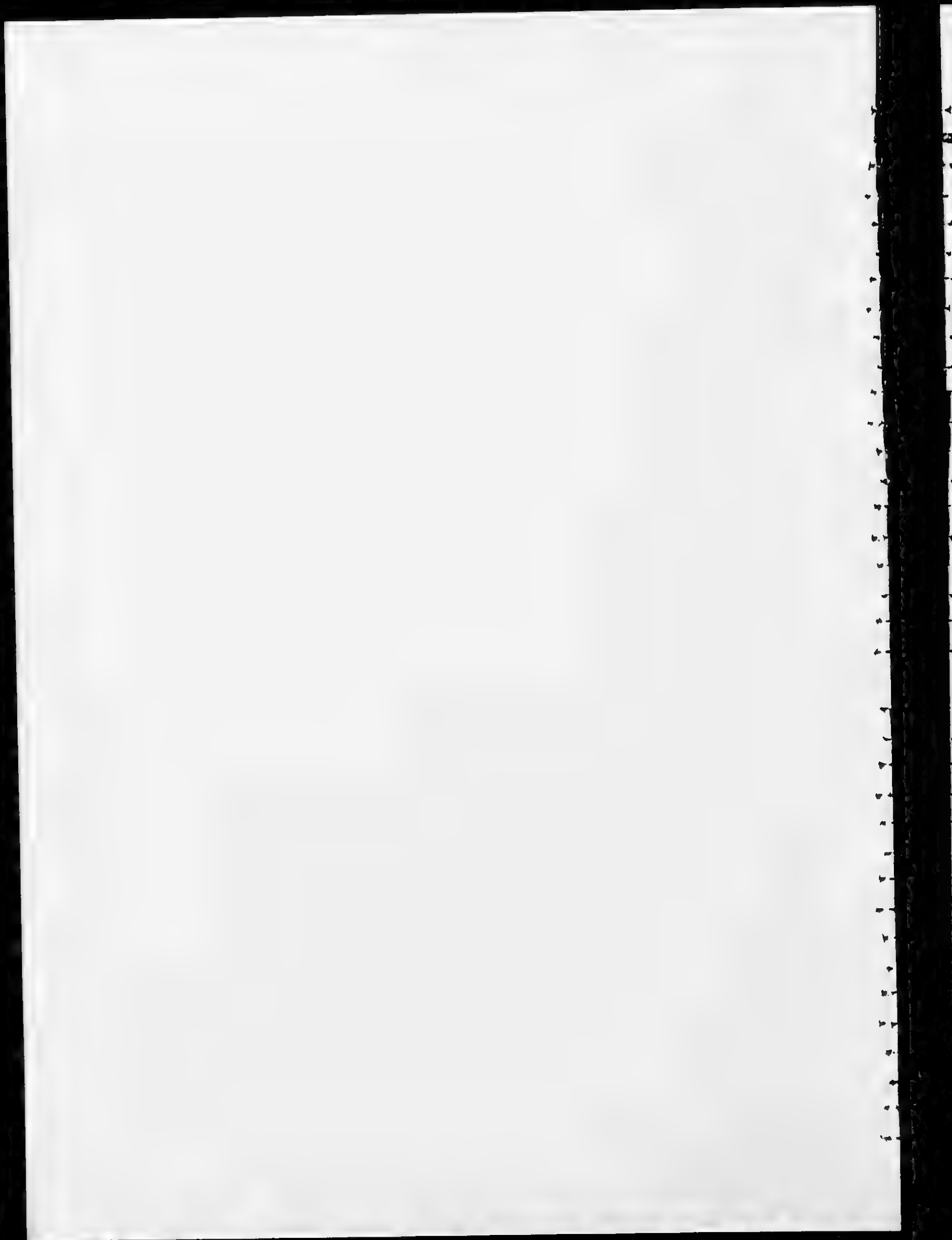
11 COMMISSIONER DIXON: You argue to us that the record  
12 is different from what the Hearing Examiner found.

13 MR. O'MALLEY: Absolutely.

14 COMMISSIONER DIXON: And the charge you argue, that  
15 they were in in this respect, and by doing this they eliminated  
16 themselves?

17 MR. O'MALLEY: That is right, sir. That is right.  
18 But I don't have the time now, but in answer to one of the  
19 commissioner's questions here, as far as Kennecott being a  
20 potential competitor absent intent, starting I believe on  
21 page 91 of the Appeal Brief, I compared the Procter & Gamble  
22 Case and the criteria therein to what we have here, and it is  
23 on all fours -- on all fours. Kennecott was by far the most  
24 likely entrant into this business.

25 CHAIRMAN KIRKPATRICK: Any further questions?



The oral argument is closed.

(Whereupon, at 4:25 p.m. oral argument in the above-entitled matter was concluded.)

BRIEF FOR PETITIONER (INCLUDING PETITIONER'S RESPONSE TO  
MOTIONS TO DISMISS)

---

IN THE  
UNITED STATES COURT OF APPEALS  
FOR THE  
DISTRICT OF COLUMBIA CIRCUIT

---

No. 24,629

---

UNITED STEELWORKERS OF AMERICA, AFL-CIO,  
Petitioner,

v.

FEDERAL TRADE COMMISSION,  
Respondent,

and

KENNECOTT COPPER CORPORATION,  
Intervenor.

---

ON PETITION FOR REVIEW OF AN ORDER  
OF THE FEDERAL TRADE COMMISSION

---

Of Counsel:

BERNARD KLEIMAN  
10 South LaSalle Street  
Chicago, Illinois 60603

MICHAEL H. GOTTESMAN  
Bredhoff, Barr, Gottesman, Cohen & Peer  
1000 Connecticut Avenue, N.W.  
Suite 1300  
Washington, D. C. 20036

Attorneys for United Steelworkers  
of America, AFL-CIO

United States Court of Appeals  
for the District of Columbia Circuit

FILED DEC 7 1970

*Nathan J. Paulson*  
CLERK



## TABLE OF CONTENTS

	page
ISSUES PRESENTED FOR REVIEW-----	1
STATEMENT PURSUANT TO RULE 8(d)-----	2
STATEMENT OF THE CASE-----	2
ARGUMENT-----	7
I.    INTRODUCTION-----	7
II.   USWA HAS A RIGHT TO INTERVENE AS A PARTY IN THE FTC PROCEEDING BELOW-----	9
A.   A person Who Would Be "Adversely Affected or Aggrieved by an FTC Order in a Clayton Act Proceeding Has a Right to Intervene in Such Proceeding-----	9
B.   USWA Demonstrated "Good Cause" for Interven- ing in the Proceeding Below, and Thus Has a Right to Intervene-----	13
III.  EVEN IF THE FTC HAD DISCRETION IN THIS CASE TO GRANT OR DENY INTERVENTION TO USWA, ITS DENIAL WAS A CLEAR ABUSE OF DISCRETION-----	15
IV.   USWA HAS STANDING AND THIS COURT HAS JURISDICTION-----	16
A.   USWA Has Standing to Seek review of the FTC's Order Denying USWA Intervention as a Party in the Proceeding Below-----	17
1.   The Clayton Act is not a statute precluding judicial review-----	18
2.   Intervention in FTC proceedings under the Clayton Act is not committed by law solely to FTC discretion-----	23
3.   The FTC's order denying USWA interven- tion as a party is a final order and thus immediately reviewable-----	23

	page
B. This Court Has Jurisdiction to Review the Order Denying USWA's Motions to Intervene-----	24
CONCLUSION-----	28

## TABLE OF CITATIONS

Cases	Pages
* Abbott Laboratories v. Gardner, 387 U.S. 136 (1967) . . .	19, 20, 21
* Ass'n. of Data Processing Organizations v. Camp, 397 U.S. 150 (1970) . . . . .	21, 22
* Barlow v. Collins, 397 U.S. 159 (1970). . . . .	13, 21
B. F. Goodrich Co. v. FTC, 93 U.S. App. D.C. 50, 208 F.2d 829 (1953) . . . . .	21, 22
* Cascade Natural Gas Corp. v. El Paso Natural Gas Co., 386 U.S. 129 (1967) . . . . .	13
Citizens Committee for the Hudson Valley v. Volpe, 425 F.2d 97 (2nd Cir. 1970) . . . . .	14
City of Chicago v. U.S., 396 U.S. 162 (1969). . . . .	21
City of Houston v. C.A.B., 115 U.S. App. D.C. 94, 317 F.2d 158 (1963) . . . . .	24
Curran v. Laird, 136 U.S. App. D.C. 280, 420 F.2d 122 (1969) . . . . .	21
* Environmental Defense Fund, Inc. v. Hardin, ____ U.S. App. D.C. ____, 428 F.2d 1093 (1970). . . . .	13, 15, 27
International Shoe Co. v. F.T.C., 280 U.S. 291 (1930) . .	13,
Interstate Broadcasting Co. v. U.S., 109 U.S. App. D.C. 255, 286 F.2d 539 (1960). . . . .	24
Juarrez Gas Co. v. F.P.C., 126 U.S. App. D.C. 167, 375 F.2d 595 (1967) . . . . .	10

\* Cases principally relied on are marked with an asterik.

Cases	Pages
Lynchburg Gas Co. v. F.P.C., 284 F.2d 756 (3rd Cir. 1960) . . . . .	23
Murphy v. Colonial Federal Savings and Loan Ass'n., 388 F.2d 562 (1970) . . . . .	20
* National Coal Ass'n. v. F.P.C., 89 U.S. App. D.C. 135, 191 F.2d 462 (1951) . . . . .	8,10,11,15
* National Welfare Rights Org. v. Finch, ____ U.S. App.D.C. ____, 429 F.2d 725 (1970). . . . .	12,13,17,19,21
* Office of Communication of United Church of Christ v. F.C.C., 123 U.S.App.D.C. 229, 359 F.2d 994 (1966) . . .	14,15
Overseas Media Corp. v. McNamera, 128 U.S.App. D.C. 48, 385 F.2d 308 (1967) . . . . .	15
Peoples v. Dept. of Agriculture, 137 U.S.App. D.C. ____, 427 F.2d 561 (1970) . . . . .	19,21
Public Service Comm'n. of N.Y. v. F.P.C. 109 U.S. App. D.C. 66, 284 F.2d 200 (1960). . . . .	24
Rettinger v. F.T.C., 392 F.2d 454 (2nd Cir. 1968) . . . . .	21,22
Robertson v. F.T.C., 415 F.2d 49 (4th Cir. 1969). . . . .	21,22
Rusk v. Cort, 369 U.S. 367 (1962) . . . . .	21
Scanwell Laboratories, Inc. v. Shaffer, ____ U.S. App. D.C. ____, 424 F.2d 859 (1970). . . . .	21
Scenic Hudson Preservation Conf. v. F.P.C., 354 F.2d 608, (2nd Cir. 1965)	14
Silverman v. Rogers, 309 F.Supp. 570 (D. Mass. 1970) . . .	15
Stark v. Wickard, 321 U.S. 288 (1944) . . . . .	19
Tooachnippah v. Hickel, 397 U. S. 598 (1970). . . . .	21
United Auto Workers v. Scofield, 382 U.S. 205 (1965). . .	8
* Cases principally relied on are marked with an asterik.	

v.

Cases	Pages
U.S. v. El Paso Natural Gas Co., 376 U.S. 651 (1964) . . .	13
U.S. v. I.C.C., 337 U.S. 426 (1949). . . . .	19,25,26
U.S. v. Philadelphia National Bank, 374 U.S. 321 (1963). .	13
Virginia Petroleum Jobbers Ass'n. v. F.P.C., 104 U.S. App. D.C. 106, 259 F.2d 921 (1958). . . . .	10,23
Zacharias v. McGrath, 105 F.Supp. 421 (D.D.C. 1952). . . .	15

Statutes

page

## Administrative Procedure Act, 5 U.S.C. §§ 701 et seq

5 U.S.C. § 701-----	17, 18, 22, 23
5 U.S.C. § 702-----	8, 13, 17
5 U.S.C. § 703-----	24, 25
5 U.S.C. § 704-----	18, 24

## Clayton Act

Section 7, 15 U.S.C. § 18-----	2
Section 11, 15 U.S.C. § 21-----	4, 9, 10, 11, 12, 18, 25

## Federal Power Act

16 U.S.C. § 825g-----	10
16 U.S.C. § 825l-----	11

## Federal Trade Commission Act, 15 U.S.C. §45-----25

Legislative Materials

H. R. Rep. No. 1980, 79th Cong., 2d Sess. (1946)-----	20
Senate Doc. No. 246, 79th Cong., 2d Sess. (1946)-----	15, 21
Senate Rep. No. 752, 79th Cong., 1st Sess. (1945)-----	20

Miscellaneous

4 Davis, <u>Administrative Law Treatise</u> § 28.04-----	20
--	----





BRIEF FOR PETITIONER (INCLUDING PETITIONER'S RESPONSE TO  
MOTIONS TO DISMISS)

---

IN THE  
UNITED STATES COURT OF APPEALS  
FOR THE  
DISTRICT OF COLUMBIA CIRCUIT

---

No. 24,629

---

UNITED STEELWORKERS OF AMERICA, AFL-CIO,  
Petitioner,

v.

FEDERAL TRADE COMMISSION,  
Respondent,

and

KENNECOTT COPPER CORPORATION,  
Intervenor.

---

ON PETITION FOR REVIEW OF AN ORDER  
OF THE FEDERAL TRADE COMMISSION

---

ISSUES PRESENTED FOR REVIEW

1. Whether Petitioner had a right to intervene as a party in the Federal Trade Commission proceeding below, on the basis of the showing of interest which it made to the Commission.

2. Whether the Commission abused its discretion in denying Petitioner intervention as a party in the proceeding below in the circumstances of this case.

#### References to Rulings

(1) Order of Federal Trade Commission granting USWA leave to present oral argument and otherwise denying motion, entered August 28, 1970, Docket No. 8765, In the Matter of Kennecott Copper Corp. (App. 24-25).

(2) Order of Federal Trade Commission granting USWA permission to file brief and otherwise denying request, entered June 15, 1970, Docket No. 8765, In the Matter of Kennecott Copper Corp. (App. 18-19).

3. Whether USWA has standing to file, and this Court has jurisdiction to entertain, the instant petition for review.

STATEMENT PURSUANT TO RULE 8(d)

This case has not previously been before this Court.

STATEMENT OF THE CASE

Petitioner United Steelworkers of America, AFL-CIO (hereinafter "USWA") has filed this petition to review an Order of the Federal Trade Commission (hereinafter "FTC" or "Commission"), entered August 28, 1970, denying USWA's motion to intervene as a party supporting the complaint in FTC Docket No. 8765 (In the Matter of Kennecott Copper Corporation).

On August 5, 1968, the FTC issued a complaint against Kennecott Copper Corporation (hereinafter "Kennecott"), alleging that Kennecott's acquisition in 1968 of the business and assets of Peabody Coal Company violated Section 7 of the Clayton Act, as amended (15 U.S.C. § 18) (App. 1 , Docket Entry No. 1). In accordance with FTC procedures, evidentiary proceedings were held before a hearing examiner. On March 9, 1970, the hearing examiner issued an Initial Decision dismissing the complaint (App. 8 , Docket Entry No. 100). On March 23, 1970, FTC counsel supporting the complaint noticed an appeal to the Commission from the hearing examiner's Initial Decision, (App. 9 , Docket Entry No. 103).

USWA had been alarmed by Kennecott's acquisition of Peabody from the time it was first announced. That alarm was manifested in a letter dated January 9, 1968, from USWA's President I. W. Abel to the Commission, strongly urging the FTC to issue a complaint challenging the acquisition (App.13 ).<sup>1/</sup> When the hearing examiner issued his Initial Decision dismissing the complaint against Kennecott, USWA's alarm grew into a desire to participate directly in the proceedings before the Commission, itself.

Accordingly, on May 20, 1970, USWA filed with the FTC a motion to intervene as a party supporting the complaint, on the appeal which complaint counsel had filed from the Initial Decision to the Commission (App.12-17).<sup>2/</sup> USWA's reasons for seeking intervention as a party, spelled out more fully in its motion (App.14-17), were briefly

---

<sup>1/</sup> USWA has also campaigned actively to stem the tide of other conglomerate mergers and acquisitions which it believes threaten the public interest in preserving competition. It has lobbied for stronger laws against such mergers, and its monthly journal, which has a circulation of more than one and one-quarter million copies, has repeatedly advised its members of the dangers flowing from such mergers. USWA has also participated in other FTC proceedings involving such mergers. On March 24, 1970, USWA filed an opposition with the FTC to its proposed settlement of a case involving Textron, Inc.'s acquisition of Fafnir Bearing Company, under which divestiture of Fafnir would not have been required. The FTC itself has previously recognized USWA's interest in the conglomerate merger field, quoting from USWA's journal in FTC, Economic Report on Corporate Mergers (1969), at pages 455-456 (App.13 ).

<sup>2/</sup> The motion, accompanied by USWA's brief on the merits of the appeal, were filed at the same time as complaint counsel's brief to the Commission. Accordingly, USWA's intervention could not have delayed the course of the appeal.

as follows: (1) USWA, which is authorized by its members to assert their interests as consumers, has over one and one-quarter million members, who, with their families, are consumers of electricity; since the bulk of the fuel demands of the electric utility industry is filled by coal and the fuel cost is the single largest item of operating costs of an electric utility, any substantial lessening of competition in the coal industry and consequent rise in the price of coal would be reflected in higher electric bills to USWA's members; (2) USWA is a responsible party to assert the interest of the public in preserving full and free competition; (3) USWA sought to assure the availability of judicial review should the Commission affirm the Initial Decision, for there was no existing party who could seek judicial review of a decision favorable to Kennecott;<sup>3/</sup> and (4) conglomerate mergers and acquisitions have an adverse impact on labor relations, and USWA, as the principal bargaining representative of Kennecott's copper employees, foresees<sup>4/</sup> possible jeopardy to them from the acquisition of Peabody.

---

<sup>3/</sup> The only parties in the case were complaint counsel and Kennecott. Kennecott has a right to seek judicial review if it loses, 15 U.S.C. § 21(c), but complaint counsel is bound by the Commission's decision and therefore cannot seek review if Kennecott wins.

<sup>4/</sup> USWA's motion acknowledged that this adverse impact upon labor relations was not one subject to correction by the Commission. (App.16).



On June 15, 1970, by a 3-2 vote, the FTC issued an order denying, "at this time" and "without prejudice", USWA's motion to intervene as a party. It did grant USWA permission to file its brief on the merits (App.18-19).

In light of the Commission's apparent invitation, USWA renewed its motion to intervene as a party on August 10, 1970 (App.20-23), and explained that it had desired intervention for three purposes: (1) to submit a brief on the merits (which the Commission had already allowed); (2) to present oral argument; and (3) to assure the existence of a party who could seek review if the Commission ultimately decided in Kennecott's favor.

By order of August 28, 1970, the FTC denied USWA's renewed motion to intervene as a party, but did grant USWA permission to present oral argument (App.24-25).

Oral argument was presented before the Commission on October 27, 1970, by complaint counsel, counsel for Kennecott, and counsel for USWA. The Commission has not yet rendered its decision.

USWA's brief and oral argument to the Commission advanced a legal argument which was not being pursued by complaint counsel. The FTC complaint alleged two possible adverse effects upon competition from Kennecott's acquisition of Peabody: (1) the elimination of Kennecott as a potential entrant into the coal business in competition with the existing coal producers (including Peabody); and (2) the enhancement of Peabody's position in the coal industry, by the

addition of Kennecott's enormous resources, to such an extent as would weaken or destroy the ability of other coal companies to compete. Complaint counsel elected to pursue only the first of these allegations; USWA's brief and oral argument dealt with both. At the oral argument, the Commission members exhibited interest in the second issue, and the Chairman expressly requested Kennecott's counsel to respond to USWA's argument on the second issue.

On September 15, 1970, USWA filed its petition for review of the FTC's denial of its motions to intervene.<sup>5/</sup>

On October 15, 1970, Kennecott moved for leave to intervene herein on the side of the FTC, and such motion was granted by the Court on November 19, 1970. Simultaneously, Kennecott filed a motion to dismiss the petition for review, alleging that this Court lacked jurisdiction and that USWA lacked standing. On November 9, 1970, the FTC also filed a motion to dismiss, based essentially on the same grounds. By motions of November 9 and November 18, 1970, USWA

---

<sup>5/</sup> Because, as indicated hereinafter, it is unclear which court, the Court of Appeals or the District Court or both, has jurisdiction to review an FTC order denying a motion to intervene, we have also filed a Complaint for a Mandatory Injunction in the United States District Court for the District of Columbia (Civil Action No. 2741-70, filed September 15, 1970). We have taken no action subsequent to filing the complaint in that case, because we feel that this Court should decide in the first instance whether it or the district court has jurisdiction. As we show hereinafter, we believe this Court has jurisdiction.

moved for an extension of time to respond to the motions to dismiss of Kennecott and the FTC, respectively, so that it might answer these motions in its brief on the merits, on the ground that resolution of the issues involved in the motions to dismiss is intertwined with resolution of the issues on the merits herein.

USWA's motions were granted by this Court on December 1, 1970. Accordingly, in addition to our argument on the merits, we discuss herein the reasons why USWA has standing to seek judicial review of the FTC's order denying USWA's motion to intervene as a party, and why we believe this Court has jurisdiction to review such order. This brief, thus, also constitutes USWA's response to the motions of the FTC and Kennecott to dismiss the petition for review.

### ARGUMENT

#### I. INTRODUCTION

In view of the Commission's orders permitting USWA to file a brief with it and present oral argument, the stakes involved in its denial of intervention are narrower than they otherwise would have been. USWA was denied only one of the objectives which it hoped to achieve by intervention: the acquisition of party status, and the assurance, which such status would have provided, that USWA would be able to seek judicial review if the FTC ultimately affirms the

6/  
hearing examiner's Initial Decision. We believe that USWA would be entitled to seek judicial review of such an affirmance even if it is not a party.<sup>7/</sup> But this issue is not wholly free from doubt, for there has never been a decision by any court defining the class of persons entitled to seek review of an FTC decision favoring the respondent. In at least some cases involving other agencies, party status before the agency has been deemed a relevant factor in establishing the right to participate in subsequent review proceedings. See, e.g. United Auto Workers v. Scofield, 382 U.S. 205, 219 (1965); National Coal Association v. F.P.C., 89 U.S. App. D.C. 135, 191 F.2d 462 (1951). Accordingly, USWA is naturally discomfited by its inability to acquire party status from the FTC.

In order to fully protect its opportunity to seek judicial review of the FTC's ultimate decision on the lawfulness of Kennecott's

---

6/ It is possible, of course, that subsequent developments in the proceeding below would create other events in which USWA -- had it been granted party status -- would have been able to participate. For example, if the Commission ultimately finds the acquisition unlawful, there may well be additional proceedings relating to the nature of the relief to be required. At this moment, however, the only prejudice which USWA has suffered is that described in the text.

7/ Section 10(a) of the Administrative Procedure Act, 5 U.S.C. § 702, provides that any "person" aggrieved by final agency action may seek review thereof.

acquisition of Peabody, and to avoid the danger that USWA might be denied review by a decision holding that party status is a prerequisite to the filing of a petition challenging such a decision, USWA has concluded that it is necessary to pursue its claim that <sup>8/</sup> it was entitled to intervene.

In this brief, we show first that the FTC's denials of USWA's motions to intervene were improper. We then deal with the questions of standing and jurisdiction raised in the motions to dismiss.

II. USWA HAS A RIGHT TO INTERVENE AS A PARTY IN THE FTC PROCEEDING BELOW.

A. A Person Who Would Be "Adversely Affected or Aggrieved" by an FTC Order in a Clayton Act Proceeding Has a Right to Intervene in Such Proceeding.

Section 11(b) of the Clayton Act, 15 U.S.C. § 21(b), provides, in part:

---

<sup>8/</sup> In view of the limited purpose for which USWA now seeks intervention, it would be possible for the Court to hold the instant case in abeyance pending the FTC's ultimate decision on the legality of the acquisition. If the FTC's decision is favorable to USWA, the need to decide the instant case might disappear. If the decision is unfavorable to USWA, USWA's petition to review that decision could be consolidated with the instant case. In that consolidated case the Court could decide (a) whether party status is a prerequisite to USWA's seeking review of the final decision; and (b) if so, whether USWA was entitled to be a party. USWA would not object to this case being held in abeyance until the FTC's final decision is issued.

[A]ny person may make application, and upon good cause shown may be allowed by the Commission or Board, to intervene and appear in said proceeding by counsel or in person.

It is our contention that any person who would be "adversely affected or aggrieved" by an unfavorable FTC adjudication under the Clayton Act satisfies the "good cause" standard of 15 U.S.C. § 21(b) and thereby has a right to intervene as a party in such proceeding.

The Commission, and Kennecott, argue that the statutory word "may" vests the Commission with unfettered discretion to grant or deny intervention as it pleases. This Court, however, has held to the contrary under the Federal Power Act, which likewise provides that the agency "may" permit intervention.<sup>9/</sup> The rule enunciated by this Court is that any person who would be aggrieved by an FPC order has a right to intervene in proceedings before that agency. National Coal Association v. F.P.C., 89 U.S. App. D.C. 135, 191 F.2d 462 (1951); Virginia Petroleum Jobbers Ass'n. v. F.P.C., 104 U.S. App. D.C. 106, 259 F.2d 921 (1958); Juarez Gas Co. v. F.P.C., 126 U.S. App. D.C. 167, 375 F.2d 595 (1967). In National Coal Association, for example, this Court stated:

---

<sup>9/</sup> 16 U.S.C. § 825 g(a) provides, in part: "In any proceeding before it, the Commission . . . may admit as a party any interested State, State Commission, municipality, or any representative of interested consumers or security holders, or any competitor of a party to such proceeding, or any other person whose participation in the proceeding may be in the public interest" (Emphasis added).



It is said that the Commission is authorized to permit or deny intervention at its discretion and that, since these petitioners had no right to intervene, they can have no right to judicial review. The Commission itself admits, however, that it may not abuse its discretion. This, to us, means that there are some persons who have a right to participate in Commission proceedings and some who do not. We think it clear that any person who would be "aggrieved" by the Commission's order, such as a competitor, is also a person who has a right to intervene. Otherwise, judicial review, which may be had only by a party to the proceedings before the Commission who has been "aggrieved" by its order, could be denied or unduly forestalled by the Commission merely by denying intervention. (191 F.2d at 466-467; footnotes omitted; emphasis added).

The Federal Power Act expressly grants the right to seek judicial review to any "party" to the agency proceeding,<sup>10/</sup> and this is one of the factors cited by the Court in National Coal as prompting its holding that intervention is a matter of right. The Clayton Act, by contrast, does not expressly provide a right of review to anyone except the respondent who is ordered to "cease and desist".<sup>11/</sup> However, as we show infra, the Administrative

---

<sup>10/</sup> 16 U.S.C. § 325 1(b) provides, in part: "any party to a proceeding under this chapter aggrieved by an order issued by the Commission in such proceeding may obtain a review of such order in the United States Court of Appeals. . . ."

<sup>11/</sup> 15 U.S.C. § 21(c) provides, in part: "Any person required by such order of the commission or board to cease and desist from any such violation may obtain a review of such order in the court of appeals of the United States. . . ."

Procedure Act ("APA") provides a right of review to others aggrieved by FTC action. And as this Court has recently held, those who would be "aggrieved" by adverse agency action within the meaning of the APA are entitled to intervene in the agency proceeding to assert their claims that such adverse action should not be taken. National Welfare Rights Organization v. Finch, \_\_\_ U.S. App. D.C. \_\_\_, 429 F.2d 725 (1970). This Court there held that organizations representing the interests of welfare recipients were entitled to intervene in HEW "conformity hearings" because they might be "aggrieved" by the results of such hearings and therefore entitled to judicial review under the <sup>12/</sup>APA.

Applying the principle of National Welfare Rights, a person who demonstrates that he would be aggrieved by an FTC order in a Clayton Act proceeding thereby satisfies the "good cause" criterion of 15 U.S.C. 21(b) and has a right to intervene as a party in such proceeding.

In the next section, we show that USWA demonstrated "good cause" for intervening in the proceeding below, and that it would be aggrieved by an adverse final decision therein.

---

<sup>12/</sup> As this Court stated: "Although by no means concomitant, 'the problem of right to intervene in administrative proceedings is closely related to and in some measure governed by the elaborate body of law concerning standing to challenge and to enforce administrative action.'" 429 F.2d at 732.

B. USWA Demonstrated "Good Cause" for Intervening in the Proceeding Below, and Thus Has a Right to Intervene.

It remains for us to show that USWA is a person entitled to intervene as of right in the FTC proceeding below.

A person is "aggrieved by agency action within the meaning of a relevant statute", 5 U.S.C. § 702, if his interest falls within the zone of interests sought to be protected by the statute. Barlow v. Collins, 397 U.S. 159, 164-165 (1970); Ass'n of Data Processing Service Organizations v. Camp, 397 U.S. 150, 153-155 (1970); Environmental Defense Fund, Inc. v. Hardin, \_\_\_ U.S. App. D.C. \_\_\_, 428 F.2d 1093, 1097 (1970); National Welfare Rights Org., supra at 734.

Among the interests sought to be protected by Section 7 of the Clayton Act is the consumer's stake in a market place free of the shackles which might result from mergers substantially lessening competition. See, e.g., International Shoe Co. v. FTC, 280 U.S. 291, 297-298 (1930); U.S. v. Philadelphia National Bank, 374 U.S. 321, 367 (1963); U.S. v. El Paso Natural Gas Co., 376 U.S. 651, 659 (1964). Indeed, in Cascade Natural Gas Corp. v. El Paso Natural Gas Co., 336 U.S. 129, the Supreme Court held that consumer representatives were entitled to intervene as of right in a Section 7 action brought by the Justice Department in a federal district court. Section 7 is enforceable either by a Justice Department suit in district court or by an FTC proceeding. It would be ironic, indeed, if the right of

consumer representatives to intervene depended upon the fortuity of which enforcement route is chosen.

This Court has recognized that labor unions are "responsible and representative groups eligible to intervene" in administrative agency proceedings to assert consumer interests. Office of Communication of United Church of Christ v. F.C.C., 123 U.S. App. D.C. 229, 359 F.2d 994, 1005 (1966). They "are found in every community; they usually concern themselves with a wide range of community problems and tend to be representatives of broad as distinguished from narrow interests, public as distinguished from private or commercial interests." Ibid.

USWA has approximately one and one-quarter million members, who, with their dependents, constitute a significant percentage of the consuming public. These members have authorized USWA to represent their interests as consumers. USWA has "proved the genuineness of [its] concern by demonstrating that [it is] 'willing to shoulder the burdensome and costly process of intervention' in an administrative proceeding." Citizens Committee for the Hudson Valley v. Volpe, 425 F.2d 97, 103 (2nd Cir. 1970); see also, United Church of Christ, supra, 359 F.2d at 1005. USWA has also, as noted supra, page 3, n.1, "by [its] activities and conduct . . . exhibited a special interest in" preserving the competition threatened by this and other acquisitions. Citizens Committee, supra at 103; Scenic Hudson Preservation Conf. v.

consumer representatives to intervene depended upon the fortuity of which enforcement route is chosen.

This Court has recognized that labor unions are "responsible and representative groups eligible to intervene" in administrative agency proceedings to assert consumer interests. Office of Communication of United Church of Christ v. F.C.C., 123 U.S. App. D.C. 229, 359 F.2d 994, 1005 (1966). They "are found in every community; they usually concern themselves with a wide range of community problems and tend to be representatives of broad as distinguished from narrow interests, public as distinguished from private or commercial interests." Ibid.

USWA has approximately one and one-quarter million members, who, with their dependents, constitute a significant percentage of the consuming public. These members have authorized USWA to represent their interests as consumers. USWA has "proved the genuineness of [its] concern by demonstrating that [it is] 'willing to shoulder the burdensome and costly process of intervention' in an administrative proceeding." Citizens Committee for the Hudson Valley v. Volpe, 425 F.2d 97, 103 (2nd Cir. 1970); see also, United Church of Christ, supra, 359 F.2d at 1005. USWA has also, as noted supra, page 3, n.1, "by [its] activities and conduct . . . exhibited a special interest in" preserving the competition threatened by this and other acquisitions. Citizens Committee, supra at 103; Scenic Hudson Preservation Conf. v.

F.P.C., 354 F.2d 603, 616 (2nd Cir. 1965).<sup>13/</sup>

Another aspect of USWA's "good cause" showing stems from the present uncertainty in the law as to whether non-parties are entitled to seek judicial review of FTC decisions holding acquisitions lawful under Section 7 of the Clayton Act. If it were ultimately held that only parties are entitled to review, that factor alone would be decisive in establishing USWA's entitlement to party status before the FTC. See National Coal Association, supra.

In sum, USWA was entitled to intervene as a matter of right in the proceeding below.

III. EVEN IF THE FTC HAD DISCRETION IN THIS CASE TO GRANT OR DENY INTERVENTION TO USWA, ITS DENIAL WAS A CLEAR ABUSE OF DISCRETION.

---

We have shown that USWA is entitled as of right to intervene below. But even if it were not, and the matter were committed to agency discretion, the FTC's denial of intervention here constituted a clear abuse of discretion.<sup>14/</sup>

---

<sup>13/</sup> It is, of course, indisputable today that members of the public who are intended beneficiaries of a regulatory scheme are not precluded from assisting in protecting the public interest even though such task has also been delegated by Congress to a regulatory agency. See, e.g., United Church of Christ, supra at 1003; Environmental Defense Fund, supra at 1097.

<sup>14/</sup> Even as to agency action committed to agency discretion by law, judicial review pursuant to the APA is available when that discretion has been abused. Overseas Media Corp. v. McNamera, 128 U.S. App. D.C. 48, 385 F.2d 308, 316 (1967); Zacharias v. McGrath, 105 F.Supp. 421 (D.C. D.C. 1952); Silverman v. Rogers, 309 F.Supp. 570 (D. Mass. 1970). Legislative history of the APA also bears this out. See Senate Doc. No. 248, 79th Cong., 2nd Sess. 310-311 (1946).



As discussed supra, and as made clear in its motions to intervene to the FTC, USWA sought to accomplish three objectives by intervention: (1) file a brief, (2) present oral argument, and (3) assure its right to seek judicial review of the final decision. The FTC permitted USWA to file a brief and to present oral argument before the full Commission. It thus recognized that USWA had an interest in the proceeding and, after reading USWA's brief, it concluded that USWA had a contribution to make sufficient to warrant a half hour of argument time before the full Commission.

By granting USWA two of its three objectives -- and the only ones which required any additional expenditure of time and resources by the FTC -- and denying only the assurance of judicial review, the sole effect of the Commission's action is the possibility that its ultimate decision may thereby be cloaked from judicial review altogether. (As earlier noted, there is no other party to the proceeding below who can seek review of the ultimate decision if it favors Kennecott.) Whatever the legitimate factors which might warrant the exercise of agency discretion to deny intervention (assuming the agency had such discretion), this surely is not one of them.

#### IV. USWA HAS STANDING AND THIS COURT HAS JURISDICTION.

We have shown in the preceding sections that USWA is entitled to intervene in the proceeding below. We now show that USWA had standing to challenge the denial of intervention, and that this Court has jurisdiction to adjudicate that challenge.

A. USWA Has Standing to Seek Review of the FTC's Order Denying USWA Intervention as a Party in the Proceeding Below.

Both the FTC and Kennecott assert, in their respective motions to dismiss, that USWA lacks standing to seek judicial review of the order denying intervention. As we explained in our motions for extension of time to respond to the motions to dismiss, the question of USWA's standing herein is intertwined with the resolution of this action on the merits.

USWA has standing to review the FTC order denying it intervention if it has suffered a "legal wrong" or is "adversely affected or aggrieved" by such order, 5 U.S.C. § 702,<sup>15/</sup> unless such order is unreviewable because "statutes preclude judicial review" or because "agency action is committed to agency discretion by law." 5 U.S.C. § 701(a).<sup>16/</sup> FTC and Kennecott assert that both exceptions apply to this case. However, as we show herein, no statute precludes judicial review of an FTC order denying a motion to intervene, and such action is not committed to FTC discretion by law. FTC further argues that

---

<sup>15/</sup> 5 U.S.C. § 702 provides: "A person suffering a legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof." "Included 'within the meaning of a relevant statute' are persons intended to be the beneficiaries of the statutory scheme. Thus the relevant statute is the conduct of standing; no express grant of standing need be found." National Welfare Rights Org., supra at 734.

<sup>16/</sup> 5 U.S.C. § 701(a) provides: "This chapter applies, according to the provisions thereof, except to the extent that - (1) statutes preclude judicial review; or (2) agency action is committed to agency discretion by law."

the order denying intervention is "interlocutory", and not "final agency action", within the meaning of 5 U.S.C. § 704.<sup>17/</sup> But the order is a final order and thus is immediately reviewable, as we show herein.

1. The Clayton Act is not a statute precluding judicial review

The judicial review provisions of the APA do not apply where a statute precludes judicial review.<sup>18/</sup> The FTC and Kennecott, in their motions to dismiss USWA's petition for review, assert that because Section 11(c) of the Clayton Act, 15 U.S.C. § 21(c), expressly provides for review of cease and desist orders at the behest of the respondent in an FTC proceeding,<sup>19/</sup> Congress thereby has manifested an intention to preclude judicial review by any other person, including USWA, of any other type of FTC order, including an order denying a motion to intervene as a party. This approach has been expressly rejected by the Supreme Court, and by this and other Courts of Appeals.

---

<sup>17/</sup> 5 U.S.C. § 704 provides, in part: "Agency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court are subject to judicial review."

<sup>18/</sup> 5 U.S.C. § 701(a): "This chapter applies, according to the provisions thereof, except to the extent that - (1) statutes preclude judicial review; . . ."

<sup>19/</sup> 15 U.S.C. § 21(c) provides, in relevant part: "Any person required by such order of the commission or board to cease and desist from any such violation may obtain a review of such order in the court of appeals of the United States. . . ."

In Abbott Laboratories v. Gardner, 387 U.S. 136, 141 (1967),

the Supreme Court stated:

"The mere fact that some acts are made reviewable should not suffice to support an implication of exclusion as to others. The right to review is too important to be excluded on such slender and indeterminate evidence of legislative intent." (Quoting Jaffe, Judicial Control of Administrative Action, at 357 (1965); emphasis ours.)

In Abbott Laboratories, supra, the government argued that because the statute there involved included a specific review provision for certain enumerated kinds of administrative action, other types not enumerated were necessarily meant to be excluded from review. The Court rejected this argument, and held (387 U.S. at 144) that:

The special-review procedures provided in § 701(f) [of the Federal Food, Drug, and Cosmetic Act], applying to regulations embodying technical factual determinations, were simply intended to assure adequate judicial review of such agency decisions, and that their enactment does not manifest a congressional purpose to eliminate judicial review of other kinds of agency action. (Emphasis added). 20/

---

20/ See also, Stark v. Wickard, 321 U.S. 288 (1944); U.S. v. I.C.C., 337 U.S. 426 (1949); Peoples v. Dept. of Agriculture, 137 U.S. App. D.C. \_\_\_, 427 F.2d 561 (1970) ("There is no fair implication that granting this special judicial review to food distributors was intended to curtail or negative the judicial review otherwise presumed to be available for the protection of the poor," 427 F.2d at 565); and National Welfare Rights Org. v. Finch, \_\_\_ U.S. App. D.C. \_\_\_, 429 F.2d 725 (1970) ("The fact that the statute in question explicitly gave judicial review to the states and said nothing about welfare recipients is not 'clear and convincing evidence' that Congress intended to deny review to the primary beneficiaries under the statute," 429 F.2d at 736). In analyzing the Stark decision, Prof. Davis, in his treatise on administrative law, stated: "The Supreme Court's decision in favor of review in the Stark case was in spite of the statute, and not because of it, since the statute provided for review of certain other orders but not of this one. That the only discernible legislative intent was at least arguably on the side of unreviewability makes the holding of reviewability all the stronger

(Continued)

No provision of the Clayton Act or the Federal Trade Commission Act expressly precludes judicial review of FTC orders other than cease and desist orders, nor is there a shred of legislative history to suggest that Congress wished to preclude judicial review of FTC denials of intervention; to the contrary, legislative history of the APA, which was passed subsequent to the Federal Trade Commission Act, strongly suggests <sup>21/</sup> that a primary purpose of the APA was to insure such review.

---

20/ (Continued from preceding page)  
as a common-law proposition." 4 Davis, Administrative Law Treatise § 28.04 at 22. See also, Murphy v. Colonial Federal Savings and Loan Ass'n, 388 F.2d 609 (1967), where the Second Circuit stated at 613: "Although both provisions regulate judicial review only when the [Federal Home Loan Bank] Board has issued a cease and desist order, Colonial's argument would require us to infer from this statutory framework a congressional intention to preclude citizens from exercising their ordinary judicial remedies. The impropriety of any such construction appears a fortiori from decisions that provision for judicial review of certain types of federal administrative action does not without more prevent review of other types. . . ."

21/ The legislative history offered by Kennecott at pp. 11-12 of its memorandum in support of its motion to dismiss is inconclusive indeed, and in no way suggests that judicial review of denials of intervention was intended to be precluded. In contrast, legislative history of the APA strongly supports judicial review. See H.R. Rep. No. 1980, 79th Cong., 2d Sess., 41 (1946): "To preclude judicial review under this bill a statute, if not specific in withholding such review, must upon its face give clear and convincing evidence of an intent to withhold it. The mere failure to provide specially by statute for judicial review is certainly no evidence of intent to withhold review." (Quoted by the Supreme Court in Abbott Laboratories, supra, at 140, n. 2.) See also S. Rep. No. 752, 79th Cong., 1st Sess., 26 (1945). This view is further supported by the following exchange on the floor of the Senate:

"Mr. Austin: Is it not true that among the cases cited by the distinguished Senator were some in which no redress or no review was granted, solely because the statute did not provide review?

"Mr. McCarran: That is correct.

"Mr. Austin: And is it not also true that, because of the situation in which we are in at this moment, this bill is

(Continued)

As the Supreme Court stated, "only upon a showing of 'clear and convincing evidence' of a contrary legislative intent should the courts restrict access to judicial review." Abbott Laboratories, <sup>22/</sup>supra at 141. Such "clear and convincing evidence" is totally absent here.

Furthermore, both the Second and Fourth Circuits have recently said that FTC actions other than cease and desist orders are reviewable under the provisions of the APA. Rettinger v. F.T.C., 392 F.2d 454 (2nd Cir. 1968); Robertson v. F.T.C., 415 F.2d 49 (4th Cir. 1969). This Court likewise so held many years ago, B. F. Goodrich Co. v. F.T.C.,

---

21/ (Continued from preceding page)

brought forward for the purpose of remedying that defect and providing a review to all persons who suffer a legal wrong or wrongs of the other categories mentioned?

"Mr. McCarran: That is true; the Senator is entirely correct in his statement." Sen. Doc. No. 248, 79th Cong., 2d Sess. 311 (1946).

22/ Accord: Rusk v. Cort, 369 U.S. 367, 379-380, (1962); City of Chicago v. U.S., 396 U.S. 162, 164 (1969); Ass'n. of Data Processing Service Organizations, Inc. v. Camp, 397 U.S. 150, 156-157 (1970); Barlow v. Collins, 397 U.S. 159, 169 (1970); Tooachnippah v. Hickel, 397 U.S. 598, 606 (1970); Curran v. Laird, 136 U.S. App. D.C. 280, 420 F.2d 122, 125 (1969); Scanwell Laboratories, Inc. v. Shaffer, \_\_\_ U.S. App. D.C. \_\_\_, 424 F.2d 859, 865-866 (1970); Peoples v. Dept. of Agriculture, supra; National Welfare Rights Org. v. Finch, supra.



93 U.S. App. D.C. 50 , 208 F.2d 829, 832, n. 4 and text thereat  
23/  
(1953).

Hence, since the Clayton Act is not a statute precluding judicial review of FTC orders denying intervention, judicial review of such an order pursuant to the provisions of the APA is not precluded by 5 U.S.C. § 701(a) (1).

---

23/ We recognize that both Rettinger and Robertson expressed the view that the federal district courts, and not the courts of appeals, are the proper forums for review under the APA of FTC action other than cease and desist orders. In Rettinger, review was sought of the FTC's denial of a motion to reopen proceedings and to modify a consent decree. In Robertson, review was sought of an FTC order relating to compliance proceedings. In both cases, the court of appeals dismissed the petition for review on the ground of lack of jurisdiction. It was recognized in both cases, however, that the FTC action complained of was reviewable under the APA. "Robertson and Southland are not, however, without a remedy. Nothing that we have said is intended to prevent them from seeking injunctive or declaratory relief under the Administrative Procedure Act, 5 U.S.C. §§ 701-706, in the district court." Robertson at 55. See also Rettinger at 457. As we show infra, whatever the merit of Rettinger and Robertson as to the types of actions there involved, the instant action is one which seems more appropriately litigable in the court of appeals. The B. F. Goodrich decision of this Court sustained the district court's jurisdiction over an action filed therein, without discussing whether there is a right to petition for review in the courts of appeals.



2. Intervention in FTC proceedings under the Clayton Act is not committed by law solely to FTC discretion.

The review provisions of the APA also do not apply if the "agency action is committed to agency discretion by law." 5 U.S.C. § 701 (a) (2). Thus, if the FTC has absolute discretion to grant or deny a motion to intervene in Clayton Act proceedings, an order denying such a motion is unreviewable and USWA would lack standing to seek review. This, however, is the ultimate issue raised by our petition for review. Therefore, as we pointed out in our motions for extension of time, the issue of USWA's standing to seek review cannot be resolved until the issue on the merits is determined.<sup>24/</sup> And as we have shown supra, USWA does have a right to intervene as a party below and therefor is not precluded from review by 5 U.S.C. § 701(a) (2).

3. The FTC's order denying USWA intervention as a party is a final order and thus immediately reviewable.

In its motion to dismiss, the FTC asserts that its order denying USWA intervention as a party was an "interlocutory" order (p. 1). This is so only if the FTC has absolute discretion to grant or deny such

---

<sup>24/</sup> It frequently happens that the resolution of the question of standing is intertwined with the resolution of the issue on the merits, particularly where the issue on the merits is whether a right to intervene exists. See, e.g., Virginia Petroleum Jobbers Ass'n v. F.P.C., 104 U.S. App. D.C. 106, 259 F.2d 921 (1958), where this Court held that if a person has a right to intervene in an administrative proceeding, then he has a right to judicial review of an order denying intervention. See also, Lynchburg Gas Co. v. F.P.C., 284 F.2d 756, 760 (3rd Cir. 1960).

motions. As we have shown supra, however, USWA had a right to intervene, and hence the order denying such intervention is a final and immediately reviewable order. 5 U.S.C. § 704. Public Service Comm'n of N.Y. v. F.P.C., 109 U.S. App. D.C. 66, 284 F.2d 200, 203-204 (1960); Interstate Broadcasting Co. v. U.S., 109 U.S. App. D.C. 255, 286 F.2d 539, 541 (1960); City of Houston v. C.A.B., 115 U.S. App. D.C. 94, 317 F.2d 158, 160 (1963).

B. This Court Has Jurisdiction to Review the Order Denying Motions to Intervene.

We have thus far shown that USWA is entitled as of right to intervene in the FTC proceeding below and that USWA has standing to seek judicial review of an FTC order denying it intervention, pursuant to the review provisions of the APA. This means that USWA is entitled to have its claim heard by "any applicable form of legal action, including actions for declaratory judgments or writs of prohibitory or mandatory injunction or habeas corpus, in a court of competent jurisdiction." (5 U.S.C. § 703; emphasis added). The question remains as to what court, the court of appeals or the district court, or both, has jurisdiction to review such an order. Because the answer to that question is not free from doubt, USWA, has taken the precaution of filing an action in the district court, in addition to filing the instant petition for review in this Court (see page 6, n. 5, supra). For the reasons set forth below, we believe that this Court has jurisdiction over the instant petition pursuant to 5 U.S.C. § 703.

To the extent that Congress has expressly designated the appropriate review forum for FTC decisions, it has designated the Courts of Appeals. Section 11(c) of the Clayton Act, 15 U.S.C. § 21(c); Federal Trade Commission Act, 15 U.S.C. § 45(c). However, there are many types of FTC orders (including, of course, the order involved here), which, though reviewable under the APA, lack an express Congressional designation of appropriate forum. As to these, Congress has declared that they are reviewable "by any applicable form of legal action . . . in a court of competent jurisdiction." 5 U.S.C. § 703.

The Second and Fourth Circuits have declared that all FTC orders (except those expressly made reviewable in the courts of appeals) are reviewable only in the district courts (see page 22, n. 23, supra). We believe this goes too far. Suppose, for example, that the FTC were ultimately to uphold Kennecott's acquisition of Peabody. Where should that decision be reviewed? It would be irrational to say that if Kennecott loses before the FTC review is in the court of appeals (as 15 U.S.C. § 21(c) expressly requires) but that if Kennecott wins review is in the district court. In United States v. ICC, 337 U.S. 426 (1949), the Supreme Court dealt with a comparable situation. The statute there involved expressly provided that ICC orders granting reparations were reviewable in the district courts, but did not designate the appropriate forum to review ICC orders denying reparations. A suit challenging a denial of reparations was brought before a three-judge court. The Supreme Court concluded that orders denying reparations

should be reviewed by the same tribunal which Congress had designated to review orders granting reparations:

The same one-judge trial and appeal procedure available for enforcement of an award order would appear to be an equally appropriate and adequate tribunal for adjudication of validity of a Commission order denying reparations. For actions to enforce Commission orders awarding reparation, and actions to challenge Commission orders denying reparations, basically involve the same parties, the same disputes, the same claims for money damages, and the same statutes. We think the orders in both instances should be reviewed in the same one-judge tribunal. (337 U.S. at 443).

The reasoning of United States v. ICC would seem clearly to establish that review of the ultimate decision of the FTC on the validity of the acquisition should be in this Court, irrespective of the outcome. It does not follow, of course, that review of other<sup>25/</sup> types of FTC orders should necessarily be in the courts of appeals. We think that on balance, however, the particular order involved here - the denial of intervention in a proceeding ultimately reviewable in the courts of appeals - does belong in the court of appeals.

This Court has had recent occasion to note the inadvisability of "dividing between two courts the review of the various orders involved in a single administrative proceeding . . . The district court could do no more than . . . we do here; there seems to be no reason to inject another tribunal into the process." Environmental

---

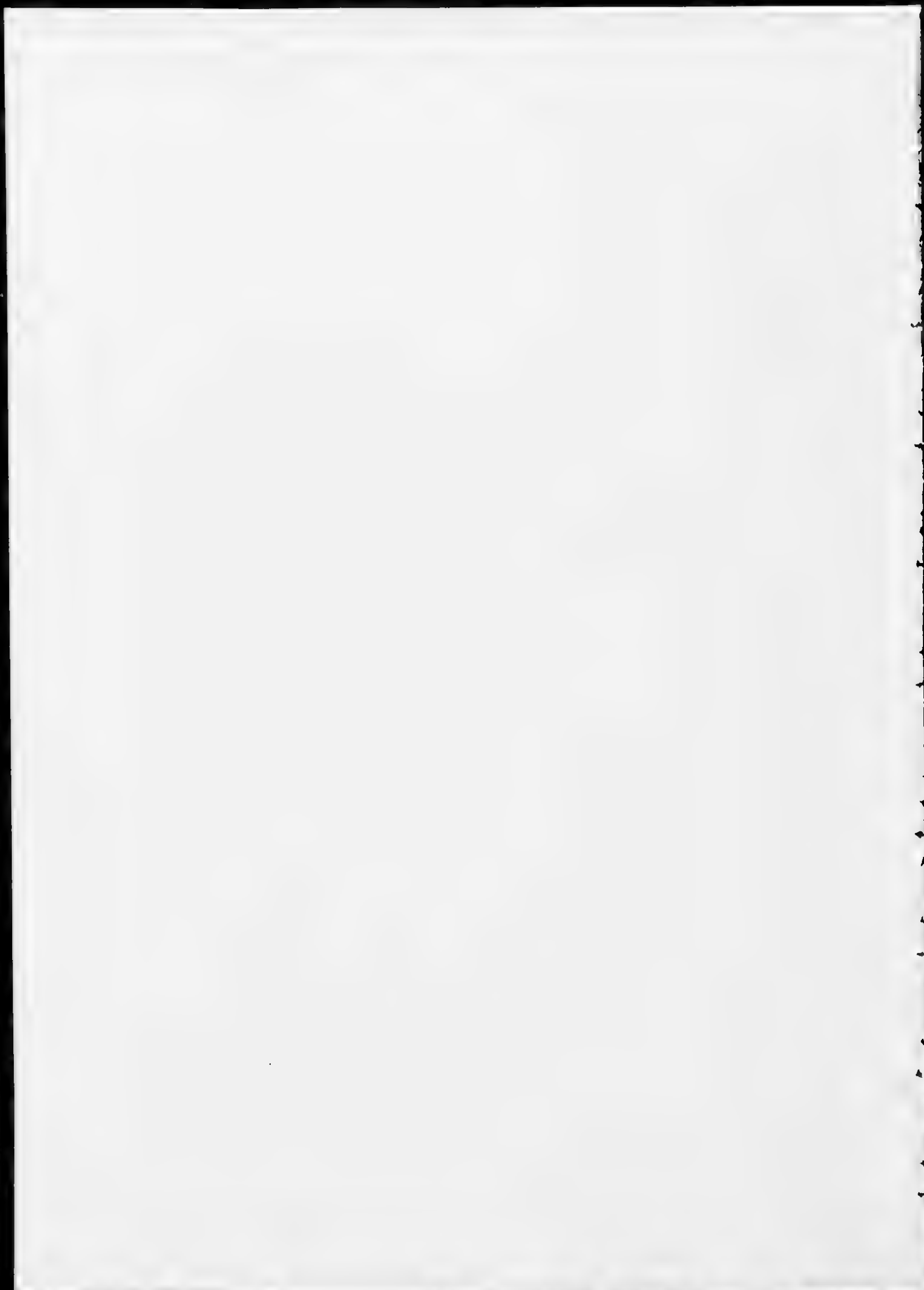
<sup>25/</sup> Thus the decisions of the Second and Fourth Circuits might arguably have been correct in concluding that the particular orders there involved should be reviewed in the district courts.

Defense Fund, Inc. v. Hardin, supra at 1098. That observation seems particularly appropriate here, for the intervention issue and the issues posed by the FTC's ultimate decision on the lawfulness of the acquisition are not wholly unrelated. We have suggested (page 9, n. 8, supra) that this Court might wish to hold the present proceeding in abeyance pending the FTC's final decision, and then consolidate the two review proceedings. And, whether or not the Court elects that course, it is possible (if party status is a prerequisite to seeking judicial review of the final decision) that the Court's power to entertain a petition on the latter issue would depend upon the resolution of the intervention issue. Surely it would be incongruous for this Court's assertion of jurisdiction over the FTC's final decision to have to await a district court's resolution of the intervention issue.

We believe, therefore, that this Court has jurisdiction to  
entertain the instant petition for review.<sup>26/</sup>

---

<sup>26/</sup> If the Court should determine, however, that the district court, and not the court of appeals, has such jurisdiction, we believe the court should issue an opinion setting forth such view.



CONCLUSION

For the foregoing reasons, the Order of the FTC denying USWA's motion to intervene as a party in the proceeding below should be reversed.

Respectfully submitted,

*Michael H. Gottesman*

MICHAEL H. GOTTESMAN  
Bredhoff, Barr, Gottesman, Cohen & Peer  
1000 Connecticut Avenue  
Suite 1300  
Washington, D. C. 20036

Of Counsel:

BERNARD KLEIMAN  
10 South LaSalle Street  
Chicago, Illinois 60603

Attorneys for United Steelworkers  
of America, AFL-CIO



No. 24,629

In the United States Court of Appeals  
for the District of Columbia Circuit

UNITED STEELWORKERS OF AMERICA, AFL-CIO,  
PETITIONER

FEDERAL TRADE COMMISSION, RESPONDENT

KENNECOTT COPPER CORPORATION, INTERVENOR

On Petition to Review an Order  
of the Federal Trade Commission

BRIEF FOR RESPONDENT

FOR THE UNITED STATES

General Counsel

HAROLD L. BENTLEY, JR.

Assistant General Counsel

KARL H. BUSCHMANN

Attorney

Attorneys for the Federal Trade Commission



## TABLE OF CONTENTS

	Page
Issues Presented for Review .....	1
Statement of the Case .....	2
The Nature of the Case .....	2
The Course of the Proceeding .....	3
Statement of the Facts Relevant to the Issues Presented for Review .....	4
Argument .....	8
I. The Court Has No Jurisdiction to Grant Relief .....	8
II. A Commission's Determination on Intervention is Discretionary and Judicially Not Reviewable..	11
III. USWA is Not an "Aggrieved" Party as a Result of the Denial of Full Intervention, It Has Failed to Show Good Cause, and the Commission Did Not Abuse Its Discretion .....	26
IV. USWA as a Complainant Cannot be Made a Party to the Proceeding .....	33
Summary .....	35
Conclusion .....	35

## II

### AUTHORITIES CITED

<u>Cases:</u>	Page
* <u>Abbott Laboratories v. Gardner</u> , 387 U.S. 136 (1967) ..	29
* <u>Amalgamated Workers v. Edison Co.</u> , 309 U.S. 261 (1940) .....	34
* <u>Auto Workers v. Scofield</u> , 382 U.S. 205 (1965) .....	11, 16
<u>Barlow v. Collins</u> , 397 U.S. 159 (1970) .....	12, 29
* <u>Brotherhood of Railroad Trainmen v. Baltimore &amp; O. R. Co.</u> , 331 U.S. 519 (1947) .....	24
* <u>Buckeye Co. v. Hocking Valley Co.</u> , 269 U.S. 42 (1925) .....	21
* <u>Cascade Nat. Gas v. El Paso Nat. Gas</u> , 386 U.S. 129 (1967) .....	20
<u>Citizens Committee for Hudson Valley v. Volpe</u> , 425 F.2d 97 (2d Cir. 1970) .....	29
* <u>City of Houston v. Civil Aeronautics Board</u> , 115 U.S. App. D.C. 94, 317 F.2d 158 (1963) .....	18, 24
* <u>City of New York v. Consolidated Gas Co.</u> , 109 U.S. App. D.C. 255, 286 F.2d 539 (1960) .....	24
<u>Commonwealth Edison Co. v. Allis-Chalmers Mfg. Co.</u> , 315 F.2d 564 (7th Cir. 1963), <u>cert. denied</u> , 375 U.S. 834 .....	21-22
<u>Consolidated Edison Co. of New York v. DiNapoli</u> , 39 L.W. 2239 (S.D.N.Y. October 16, 1970) .....	22, 23
<u>Data Processing Service v. Camp</u> , 397 U.S. 150 (1970) .....	29

### III

#### Cases--Continued

Page

<u>Environmental Defense Fund, Inc. v. Hardin,</u> U.S. App. D.C. _____, 428 F.2d 1093 (1970).....	18-19, 29
* <u>Farmers Bank v. Federal Reserve Bank,</u> 262 U.S. 649 (1923).....	15
<u>Federal Land Bank of Springfield v. Hansen,</u> 113 F.2d 82 (2d Cir. 1940).....	15
<u>Federal Trade Commission v. Fred Meyer, Inc.,</u> 390 U.S. 341 (1968).....	12
* <u>Federal Trade Commission v. Klesner,</u> 280 U.S. 19 (1929).	19, 21, 34
<u>Federal Trade Commission v. Sun Oil Co.,</u> 371 U.S. 505 (1963).....	12
* <u>The Firestone Tire &amp; Rubber Co.,</u> Docket No. 8818 (October 23, 1970), 3 CCH Trade Reg. Rep. ¶ 19373....	12-13
<u>Hobson v. Hansen,</u> 44 F.R.D. 18 (D.D.C. 1968).....	23
<u>Honda v. Clark,</u> 303 F. Supp. 213 (D.D.C. 1968).....	23
<u>International Union, United A., A. &amp; A. Imp. Workers v. National Labor Relations Board,</u> 129 U.S. App. D.C. 196, 392 F.2d 801 (1967), <u>cert.</u> <u>denied,</u> 392 U.S. 906 (1968).....	16
* <u>Interstate Broadcasting Co. v. United States,</u> 109 U.S. App. D.C. 255, 286 F.2d 539 (1960).....	24
* <u>Jensen v. Lehigh Valley R. Co.,</u> 255 Fed. 795 (S.D.N.Y. 1919).....	15
<u>Juarez Gas Co. v. Federal Power Commission,</u> 126 U.S. App. D.C. 167, 375 F.2d 595 (1967).....	28
* <u>Kansas City Power &amp; Light Co. v. McKay,</u> 962 U.S. App. D.C. 273, 225 F.2d 924.....	25
<u>Levin v. Ruby Trading Corp.,</u> 333 F.2d 592 (2d Cir. 1964).....	24

# IV

## Cases--Continued

Page

<u>National Coal Association v. Federal Power Commission</u> , 89 U.S. App. D.C. 135, 191 F.2d 462 (1951).....	28
<u>National Labor Relations Board v. Todd Co.</u> , 173 F.2d 705 (2d Cir. 1949), <u>cert. denied</u> , 340 U.S. 864 (1950).....	16
<u>National Welfare Rights Organization v. Finch</u> , _____ U.S. App. D.C. _____, 429 F.2d 725 (1970)....	18, 29
* <u>Old Colony Trust Co. v. Penrose Industries Corp.</u> , 387 F.2d 939 (3d Cir. 1968).....	23
<u>Public Service Commission of N.Y. v. Federal Power Commission</u> , 109 U.S. App. D.C. 66, 284 F.2d 200 (1960).....	33
<u>Rusk v. Cort</u> , 369 U.S. 367 (1962).....	29
* <u>Sam Fox Publishing Co. v. United States</u> , 366 U.S. 683 (1961).....	20, 21
<u>Sinclair Refining Co. v. Atkinson</u> , 370 U.S. 195 (1962).....	12
* <u>Smuck v. Hobson</u> , 132 U.S. App. D.C. 372, 408 F.2d 175 (1969).....	22
* <u>Stutphen Estates v. United States</u> , 342 U.S. 19 (1951).....	20, 24
* <u>Thompson v. Clifford</u> , 132 U.S. App. D.C. 351, 408 F.2d 154 (1968).....	15, 16
<u>Thrifty Shoppers Scrip Co. v. United States</u> , 1968 Trade Cases ¶ 72,337 (C.D. Cal. 1968), <u>aff'd</u> , 389 U.S. 580 (1968).....	22, 23

Cases--Continued

Page

<u>Tooahnippah v. Hickel</u> , 397 U.S. 598 (1970).....	29
<u>United Church of Christ v. Federal Communications Commission</u> , 123 U.S. App. D.C. 328, 359 F.2d 994 (1966).....	28
<u>United Gas Pipe Line Co. v. Federal Power Commission</u> , 86 U.S. App. D.C. 314, 181 F.2d 796 (1950), <u>cert. denied</u> , 340 U.S. 827.....	25
<u>United States v. Aluminum Co. of America</u> , 41 F.R.D. 342 (E.D. Mo. 1967), <u>aff'd</u> , 388 U.S. 457.....	22
<u>United States v. American Society of Composers, Authors and Publishers</u> , 341 F.2d 1003 (2d Cir. 1965).....	21
<u>United States v. Atlantic Richfield Co.</u> , 5 CCH Trade Reg. Rep. ¶ 73309 (S.D.N.Y. 1970).....	22, 23
<u>United States v. Automobile Manufacturers Associations</u> , 307 F. Supp. 617 (C.D. Cal. 1970), <u>aff'd</u> , 397 U.S. 248.....	22, 23
* <u>United States v. Blue Chip Stamp Co.</u> , 272 F. Supp. 432 (C.D. Cal. 1967), <u>aff'd</u> , 389 U.S. 580 (1968).....	22, 23
* <u>United States v. Borden Co.</u> , 347 U.S. 514 (1954).....	21
<u>United States v. El Paso Natural Gas Co.</u> , 376 U.S. 651 (1964).....	23
<u>United States v. First National Bank &amp; Trust Co. of Lexington</u> , 280 F. Supp. 260 (E.D. Kentucky 1967).....	23
<u>United States v. Jackson</u> , 280 U.S. 183 (1930).....	17
* <u>United States v. Philadelphia Nat. Bank</u> , 374 U.S. 321 (1963).....	34
* <u>United States v. Radio Corp. of America</u> , 186 F. Supp. 776 (E.D. Pa. 1960), <u>appeal dismissed</u> , 364 U.S. 518..	22, 23



# VI

## Cases--Continued

Page

<u>United States v. The General Tire and Rubber Co.,</u> 5 CCH Trade Reg. Rep. ¶ 73364 (N.D. Ohio 1970).....	22, 23
* <u>United States v. Western Electroc Co., 1968</u> Trade Cases ¶ 72,415 (D.N.J. 1968), <u>aff'd</u> , 392 U.S. 659.....	22, 23
<u>Utah v. American Pipe and Construction Co.,</u> 5 CCH Trade Reg. Rep. ¶ 73143 (C.D. Cal. 1970).....	22, 23
* <u>Virginia Petroleum Jobbers Ass'n v. Federal Power</u> <u>Commission, 104 U.S. App. D.C. 106, 259 F.2d</u> 921 (1958).....	24, 28
* <u>Westinghouse Broadcasting Co. v. United States,</u> 364 U.S. 518 (1960), <u>dismissing appeal from</u> 186 F. Supp. 776 (E.D. Pa. 1960).....	21
<u>Wilson Tobacco Board of Trade, Inc., 52 F.T.C.</u> 1148, (1956).....	17
<u>The Yale &amp; Towne Manufacturing Co., 52 F.T.C. 1199,</u> (1956).....	17

## Congressional References:

51 Cong. Rec. 12993 (1914).....	30
51 Cong. Rec. 13053 (1914).....	30
51 Cong. Rec. 13318 (1914).....	30, 31
51 Cong. Rec. 14224 (1914).....	31, 32

## VII

<u>Statutes:</u>	Page
Administrative Procedure Act, 5 U.S.C. § 701, § 702, § 706.....	25, 26, 32
 Clayton Act:	
Sec. 7, as amended, 15 U.S.C. § 18.....	3, 5
Sec. 11(b), as amended, 15 U.S.C. § 21(b).....	2, 10, 11 26, 32
Sec. 11(c), as amended, 15 U.S.C. § 21(c).....	9, 27
Sec. 11(d), as amended, 15 U.S.C. § 21(d).....	27
Federal Aviation Act, as amended, 49 U.S.C. § 1378(b).....	18
 Federal Trade Commission Act:	
Sec. 5, 15 U.S.C. § 45(b).....	11
Sec. 5(c), 15 U.S.C. § 45(c).....	8, 9, 27
Sec. 5(d), 15 U.S.C. § 45(d).....	27
38 Stat. 717-719 (1914).....	31
National Labor Relations Act, 29 U.S.C., § 160(b).....	16
 <u>Other:</u>	
Davis, <u>Administrative Law</u> , § 22.03 (1958).....	28
Gellhorn & Byse, <u>Administrative Law, Cases and Comments</u> , 832 (1960).....	18

VIII

Other--Continued

Page

Rules of Practice for Adjudicative Proceedings  
(16 C.F.R., § 3.14 (1970)).....16

Shapiro, Some Thoughts on Intervention Before Courts,  
Agencies, and Arbitrators, 81 Harv. L. Rev. 721,  
743 (1968).....22

Standard Sewing Equipment Corp., 4 Pike and Fisher,  
Administrative Law (2d), 382, 383 (1954).....17





In the United States Court of Appeals  
for the District of Columbia Circuit

---

No. 24,629

UNITED STEELWORKERS OF AMERICA, AFL-CIO,  
PETITIONER

v.

FEDERAL TRADE COMMISSION, RESPONDENT

---

KENNECOTT COPPER CORPORATION, INTERVENOR

---

On Petition to Review an Order  
of the Federal Trade Commission

---

BRIEF FOR RESPONDENT

---

ISSUES PRESENTED FOR REVIEW

1. Whether the Court has jurisdiction to grant relief.
2. Whether a determination committed to the discretion of the Federal Trade Commission involving intervention is judicially reviewable.

3. Whether USWA was "adversely affected or aggrieved" as a result of the denial of intervention and whether it has shown good cause and whether the Commission abused its discretion.

4. Whether a complainant can be made a party to a Commission proceeding.

By order of this Court, dated December 1, 1970, two motions to dismiss, filed in this case by the Federal Trade Commission and Kennecott Copper Corporation, respectively, were "referred for consideration by the division of the Court assigned to consider this case on the merits."

#### STATEMENT OF THE CASE

##### The Nature of the Case

This case arises on a "petition" to review one of two interlocutory orders entered by respondent, the Federal Trade Commission, granting a labor organization certain rights to participate in a pending adjudicative proceeding but denying its request for full intervention. Pursuant to Section 11(b) of the Clayton Act, as amended, 15 U.S.C. § 21(b), the Commission may allow any person upon application and upon a finding of good cause to intervene and appear in a pending



proceeding. The Commission's order of August 28, 1970, permitted the United Steelworkers of America, AFL-CIO ("USWA") to appear and present oral argument in addition to the filing of a brief in the pending proceeding in which the Commission has charged the sole respondent therein, the Kennecott Copper Corporation ("Kennecott"), with a violation of Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18, by reason of its acquisition of the Peabody Coal Company. But the order denied USWA the status of a party which USWA sought for the purpose of "judicial review of the Commission's ultimate decision, in the event that that decision fails to order Kennecott's divestiture of Peabody."

#### The Course of the Proceeding

The administrative proceeding began August 5, 1968, with the issuance of a complaint alleging that Kennecott had acquired the Peabody Coal Company ("Peabody") in violation of Section 7 of the Clayton Act, as amended (App. 1). 1/

---

1/"App." refers to the Appendix filed by USWA.

Following the filing of an answer by Kennecott, hearings were held before a hearing examiner at which extensive testimony and documentary evidence were received and proposed findings were submitted by the parties. The examiner in his initial decision of March 9, 1970, dismissed the complaint against Kennecott (App. 1-8). Commission counsel appealed to the Commission from the examiner's decision (App. 9). USWA thereafter requested and was granted permission to file a brief and to participate in oral argument, but it was not permitted to intervene as a party (App. 9-11).

Following the filing of briefs and presentation of oral argument on October 27, 1970, by Commission counsel and respective counsel for Kennecott and USWA, the case was submitted to the Commission and is awaiting a final decision.

Statement of Facts Relevant to  
the Issues Presented for Review

Through a letter of its president, dated January 9, 1968, USWA urged the Commission to challenge the merger of Peabody and Kennecott (App. 13, Pet. Br. 3). 2/ On August 5, 1968,

---

2/ "Pet. Br." refers to petitioner USWA's brief filed in this case.

the Commission issued its complaint against Kennecott, alleging that it had violated Section 7 of the Clayton Act, as amended (15 U.S.C. § 18), by reason of the acquisition (App. 1). The proceeding developed into an extensive evidentiary hearing before a hearing examiner; more than 6,000 pages of testimony were adduced and a voluminous documentary record was accumulated (App. 1-11). The examiner issued his initial decision of 206 pages on March 9, 1970, dismissing the complaint against Kennecott (App. 8). After Commission counsel had noted his appeal and had submitted his appeal brief to the Commission, USWA, on May 20, 1970, filed for the first time its motion to intervene as a party supporting the complaint and to file a brief (App. 9, 12-17).

The motion to intervene was based substantially on the following grounds: (1) USWA represents the interest of its membership as consumers of electricity, (2) it represents the interest of the public in preserving full and fair competition, (3) it assures the availability of judicial review if the complaint against Kennecott is dismissed, and (4) alleging that the "majority of the bargaining unit copper employees of Respondent Kennecott Copper Corporation are represented by USWA," it foresees certain labor related "evils" (App. 12, 14-17).

Commission counsel did not file any objection (App. 56), but Kennecott on June 1, 1970, submitted its opposition to USWA's motion alleging, in substance, that (1) USWA has no right to intervene, (2) USWA's motion is untimely, (3) the public interest is being adequately represented by existing parties, and (4) matters of labor relations policy are inappropriate in this proceeding (App. 26-46).

The Commission by order of June 15, 1970, granted USWA's request to file a brief but otherwise denied the motion to intervene as a party (App. 18-19).

On August 10, 1970, USWA renewed its motion to intervene as a party supporting the complaint (App. 10, 20-23). That motion was made "for two remaining purposes: (a) to participate in the oral argument of this case before the Commission; and (b) to assure USWA's standing to seek judicial review of the Commission's ultimate decision, in the event that that decision fails to order Kennecott's divestiture of Peabody" (App. 21-23).

Kennecott and Commission counsel opposed USWA's renewed motion (App. 48-57). Kennecott stated, inter alia, that no purpose would be served in allowing USWA intervention as a party, since it had no right of judicial review of the ultimate Commission decision (App. 48-55). Commission counsel argued

in substance that USWA's belated intervention would place an unfair burden on the parties (App. 56-57).

The Commission, by order of August 28, 1970, however, granted USWA's motion to the extent of permitting oral argument and otherwise denied the motion (App. 24-25).

Kennecott, on September 10, 1970, filed a motion for reconsideration of the Commission's order permitting USWA to participate in the oral argument (App. 58-62). On September 16, 1970, USWA opposed Kennecott's motion for reconsideration (App. 11, 63-65). Commission counsel supported Kennecott's motion for reconsideration by submitting his reasons in a memorandum, dated September 18, 1970 (App. 66-67).

The Commission, by order of September 25, 1970, denied Kennecott's motion for reconsideration (App. 68-69).

In response to Kennecott's subsequent motion, dated September 29, 1970, requesting equal time for oral argument, the Commission--having previously granted 45 minutes to each of the three participants--allowed Commission counsel 45 minutes and USWA 30 minutes to present their views while

permitting Kennecott one hour of oral argument (App. 70-72, 73). 3/

Oral argument was presented to the Commission on October 27, 1970, by Commission counsel, counsel for USWA and counsel for Kennecott. The Commission has not yet issued a decision on its appeal.

#### ARGUMENT

##### I. The Court Has No Jurisdiction to Grant Relief

In support of the Commission's pending motion to dismiss USWA's petition for review, it is urged that this Court lacks jurisdiction to decide the controversy raised in the petition for review, since the jurisdiction of courts of appeals is limited to that accorded by statute. Courts of appeals have been expressly authorized to review cease-and-desist orders issued by the Commission under Section 5(c) of the Federal

---

3/ Subsequent to the filing of the petition for review, USWA, on December 3, 1970, again filed a motion to intervene as a party (App. 74-77). Commission counsel and Kennecott opposed the motion, and the Commission by order of December 18, 1970, denied the motion (App. 92).

Trade Commission Act, 15 U.S.C. § 45(c), and Section 11(c) of the Clayton Act, as amended, 15 U.S.C. § 21(c). But no express statutory authority vests this Court with jurisdiction to review interlocutory orders such as the order denying USWA permission to intervene as a party. 4/ We incorporate herein by reference, therefore, the pending motion of the Commission to dismiss. Clearly, the Court is without jurisdiction to grant the relief sought by USWA.

If, however, the Court determines that it has jurisdiction in this matter, it would be appropriate for the Court to entertain consideration at this time of the matters presented by USWA.

Significantly, USWA has also filed an injunction and declaratory judgment action in the United States District Court for the District of Columbia (under Civil Action No. 2741-70), involving identical facts and similar legal issues.

---

4/ Supporting authorities on the subject of jurisdiction have been cited at pages 7-8 of the Commission's "Memorandum (1) in Support of Motion of Respondent to Dismiss the Petition for Review and (2) in Answer to Motions by Kennecott Copper Corporation to Intervene and to Dismiss," filed in this case on November 9, 1970. They have not been included in this brief, since doing so would only be repetitious.



Both lawsuits seek a judicial interpretation of the intervention proviso of Section 11(b) of the amended Clayton Act, 15 U.S.C. § 21(b). The merits of these cases necessarily involve the power of this Court to review at the instance of a third party (a) the Commission's determination on intervention and (b) the Commission's ultimate order dismissing the administrative complaint, which has not and may never be issued. The relevant facts are not in dispute, and the district court, in any event, cannot finally decide the jurisdiction and power of this Court.

Therefore, the discussion which follows is addressed to the issues raised in USWA's brief.

II. A Commission's Determination  
on Intervention is Discretionary  
and Judicially Not Reviewable

"Federal agencies are not fungibles for intervention purposes--Congress has treated the matter with attention to the particular statutory scheme and agency. In some instances, the words of the statute themselves elicit an answer." Auto Workers v. Scofield, 382 U.S. 205, 210 (1965).

USWA's request for intervention was made pursuant to Section 11(b) of the Clayton Act, 15 U.S.C. § 21(b), which provides, inter alia:

The person [charged with a violation of Section 7] shall have the right to appear at the place and time so fixed and show cause why an order should not be entered by the Commission or Board requiring such person to cease and desist from the violation of the law so charged in said complaint. The Attorney General shall have the right to intervene and appear in said proceeding and any person may make application, and upon good cause shown may be allowed by the Commission or Board, to intervene and appear in said proceeding by counsel or in person. The testimony in any such proceeding shall be reduced to writing . . . . [Emphasis supplied.]

This provision, respecting intervention, as applied to the Federal Trade Commission, as well as the similar proviso of Section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45(b), has not heretofore been the subject of judicial

interpretation. This case, therefore, presents an issue of statutory construction.

In dealing with problems of interpretation and application of federal statutes, courts give effect to the legislative intent of such laws. Sinclair Refining Co. v. Atkinson, 370 U.S. 195, 215 (1962); Federal Trade Commission v. Sun Oil Co., 371 U.S. 505, 518 (1963); Federal Trade Commission v. Fred Meyer, Inc., 390 U.S. 341, 349 (1968). The meaning of the statutory term must be resolved by judicial application of canons of statutory construction. Barlow v. Collins, 397 U.S. 159, 166 (1970).

The plain language of the above-quoted intervention proviso clearly shows the legislative intent that a prerequisite to a determination by the Commission of whether it may allow intervention is a showing of "good cause" by the applicant. Without a showing of good cause the Commission may not allow intervention to a third party.

For example, in the most recent order by the Commission dealing with intervention, The Firestone Tire & Rubber Co., Docket No. 8818 (October 23, 1970), 3 CCH Trade Reg. Rep.

¶ 19373, 5/ the Commission generally explained several areas of consideration relevant to the requirement of good cause:

\* \* \* it must be demonstrated that (1) the persons seeking such intervention desire to raise substantial issues of law or fact which would not otherwise be properly raised or argued, and (2) the issues thus raised are of sufficient importance and immediacy to warrant an additional expenditure of the Commission's limited resources on a necessarily longer and more complicated proceeding in that case, when considered in light of other important matters pending before the Commission. This second factor means a determination that such additional expenditure is fully consistent with the Commission's own assessment of overall priorities governing the allocation of its own resources. A finding of this nature should be one prerequisite to an ultimate judgment that "good cause" exists to permit intervention in a particular case. \* \* \* We would suggest the following additional factors which will generally be considered: the applicant's ability to contribute to the case; the Commission's need for expedition in the handling of the case; and the possible prejudice to the rights of original parties if intervention is allowed. [Emphasis by the Commission.]

However, the Commission was careful to point out:

But we wish to emphasize that satisfaction of the above standard, or of any other test or

---

5/ USWA referred to this order in its latest application for intervention (App. 74).

formula, will not automatically result in a right of intervention. As stated previously, the exercise of discretion on a question of intervention depends on an assessment of all of the facts and circumstances of a particular case, and each grant or denial will have minimal, if not non-existent, precedential value.

The Commission further elaborated:

\* \* \* there are important countervailing considerations which must be weighed in the balance: the need to maintain an orderly and efficient adjudicative procedure and the need to control resource allocation on the basis of a system of established priorities. The public would be ill-served by an agency whose proceedings were vulnerable to disruption and agonizing delay by means of the proliferation of parties and other participants. Furthermore, the need for public interest intervenors in FTC proceedings is substantially less than the need for such intervention in the proceedings of other agencies. Unlike some other agencies, the FTC has a built-in public interest prosecutor in all of its proceedings; our adjudications are truly adversarial, without intervention of any kind. Therefore, it is reasonable to require a substantial showing of special circumstances justifying intervention in a particular case.

In allowing intervention in the present case, we are beginning a delicate experiment, one requiring caution and close observation. Nothing in this opinion should be construed as a permanent or irreversible policy decision; we have many apprehensions concerning this step, and we find a need for a period of probation.

Once the Commission has determined that a person has made a showing of good cause, the statute provides that he "may be allowed by the Commission" to intervene. Although the word

"may" does not invariably indicate discretion (Pet. Br. 10), it ordinarily connotes discretion when the word "shall" appears in close juxtaposition in other parts of the same statute. Farmers Bank v. Federal Reserve Bank, 262 U.S. 649, 662-63 (1923); Thompson v. Clifford, 132 U.S. App. D.C. 351, 355, 408 F.2d 154, 158 (1968); Federal Land Bank of Springfield v. Hansen, 113 F.2d 82, 84 (2d Cir. 1940). Judge Learned Hand stated: "'May' does indeed at times means 'shall,' but hardly when the two words are in such immediate contrast." Jensen v. Lehigh Valley R. Co., 255 Fed. 795, 796 (S.D.N.Y. 1919).

Congressional intent of the statute here under consideration is particularly plain when it is considered that in the same sentence it is provided that, "[t]he Attorney General shall have the right to . . . and any person . . . may be allowed . . . to intervene." It is important to note that the contrast is not only between "shall" and "may" but between "shall have the right" and "may be allowed." The discretionary power of the Commission involving intervention is evident because "the conclusion to be reached 'depends on the context of the statute, and on whether it is fairly to be presumed that it was the intention of the legislature to confer a discretionary

power or to impose an imperative duty.'" Thompson v. Clifford, 132 U.S. App. D.C. 351, 355, 408 F.2d 154, 158 (1968). This is further supported by a comparison of the present language "may be allowed" with the language in Rule 24(b) of the Federal Rules of Civil Procedure providing for permissive or discretionary intervention, namely "anyone may be permitted to intervene," and with the language of the discretionary intervention proviso of the National Labor Relations Act, 29 U.S.C. § 160(b), which provides, in part, "any other person may be allowed to intervene." This Court, for example, has given effect to the discretionary language under the latter statute in International Union, United A., A. & A. Imp. Workers v. National Labor Relations Board, 129 U.S. App. D.C. 196, 204, 392 F.2d 801, 809 (1967), cert. denied, 392 U.S. 906 (1968); see also, National Labor Relations Board v. Todd Co., 173 F.2d 705, 707 (2d Cir. 1949), cert. denied, 340 U.S. 864 (1950). 6/

The Commission's Rules of Practice for Adjudicative Proceedings (16 C.F.R. § 3.14 (1970)) embody this discretionary,

---

6/ Charging or charged parties in National Labor Relations Board proceedings, however, have a right to intervene, 29 C.F.R. § 102.8 (1968); Auto Workers v. Scofield, 382 U.S. 205, 208 (1965).



statutory authority by providing, in part, "[t]he hearing examiner or the Commission may by order permit the intervention to such extent and upon such terms as are provided by law or as otherwise may be deemed proper." This view of its discretionary authority has been consistently adhered to by the Commission in the past. Standard Sewing Equipment Corp., 4 Pike and Fisher, Administrative Law (2d), 382, 383 (1954); Wilson Tobacco Board of Trade, Inc., 52 F.T.C. 1148, 1149 (1956); The Yale & Towne Manufacturing Co., 52 F.T.C. 1199, 1200 (1956). "It is a familiar rule of statutory construction that great weight is properly to be given to the construction consistently given to a statute by the Executive Department charged with its administration . . . and such construction is not to be overturned unless clearly wrong, or unless a different construction is plainly required." United States v. Jackson, 280 U.S. 183, 193 (1930).

The authorities relied upon by USWA are inapposite to this case. For example, it is argued that anyone "who would be 'adversely affected or aggrieved' by an unfavorable FTC adjudication under the Clayton Act satisfied the 'good cause' standard" (Pet. Br. 10). If that were true, Congress would

have provided for judicial review in such circumstances. As we shall show below in Point III, Congress has not done so; indeed, the legislative history shows that Congress expressly refused to provide for judicial review by persons other than respondents against whom cease-and-desist orders have been issued.

USWA next relies on several court decisions involving the Federal Power Commission and the Federal Communications Commission (Pet. Br. 10-11, 14-15) 7/ which arose under statutory authority differing from that involved here. The rationale common to these cases is that with issuance of licenses or certificates of public necessity and convenience, the agency should consider the competitive consequences of a grant. 8/ This Court so recognized in Environmental

---

7/ See also, The Federal Aviation Act, as amended, 49 U.S.C., § 1378(b); City of Houston v. Civil Aeronautics Board, 115 U.S. App. D.C. 94, 96, 317 F.2d 158, 160 (1963).

8/ Gellhorn & Byse, Administrative Law, Cases and Comments, 832 (1960), cited with approval in National Welfare Rights Organization v. Finch, \_\_\_\_\_ U.S. App. D.C. \_\_\_\_\_, 429 F.2d 725, 732 n. 24 (1970).

Defense Fund, Inc. v. Hardin, \_\_\_\_\_ U.S.App. D.C. \_\_\_\_\_,

428 F.2d 1093, 1097 (1970), where Chief Judge Bazelon speaking for the Court stated: "Consumers of regulated products and services have standing to protect the public interest in the proper administration of a regulatory system enacted for their benefit." By contrast, a Commission proceeding does not bestow a grant or a license but results in a finding of whether any of its statutes have been violated. This important distinction was early recognized by the Supreme Court in Federal Trade Commission v. Klesner, 280 U.S. 19, 26 (1929) where the Court, speaking through Mr. Justice Brandeis, stated:

The provisions in the Federal Trade Commission Act concerning unfair competition are often compared with those of the Interstate Commerce Act dealing with unjust discrimination. But in their bearing upon private rights, they are wholly dissimilar. The latter Act imposes upon the carrier many duties; and it creates in the individual corresponding rights. For the violation of the private right it affords a private administrative remedy. It empowers any interested person deeming himself aggrieved to file, as of right, a complaint before the Interstate Commerce Commission; and it requires the carrier to make answer. Moreover, the complainant there, as in civil judicial proceedings, bears the expense of prosecuting his claim. The Federal Trade Commission Act contains no such features.

While the Federal Trade Commission exercises under § 5 the functions of both prosecutor and judge, the scope of its authority is strictly limited. [Emphasis supplied.]

USWA's reliance on Cascade Nat. Gas v. El Paso Nat. Gas, 386 U.S. 129 (1967), is also entirely misplaced. That case arose under the Federal Rules of Civil Procedure, and the "question concerning intervention [turned] on a construction of Rule 24(a) of the Federal Rules of Civil Procedure, entitled 'Intervention of Right.'" Id. at 132. As stated, supra, the Clayton Act does not contain such a feature. Even if it did, as USWA contends (Pet. Br. 13), a would-be intervenor must make a showing that he was "'so situated' . . . as to be 'adversely affected.'" Id. at 135. However, USWA cannot make such a showing since its asserted purpose for intervention, namely the availability of judicial review of the ultimate Commission decision, is invalid. Furthermore, USWA will not be bound by the ultimate decision of the Commission. Sam Fox Publishing Co. v. United States, 366 U.S. 683, 694 (1961); Sutphen Estates, Inc. v. United States, 342 U.S. 19, 20 (1951).

In the past, the Supreme Court has generally refused to permit private plaintiffs to press their private claims against respondents in the government suit. Sam Fox Publishing Co. v.

United States, 366 U.S. at 693; Federal Trade Commission v. Klesner, 280 U.S. 19, 26 (1929). A fortiori, intervention is improper when a private party, such as USWA, appears in a government suit to vindicate its theory of the public interest. The government alone speaks for the public interest in antitrust proceedings. Buckeye Co. v. Hocking Valley Co., 269 U.S. 42, 49 (1925); see also, United States v. Borden Co., 347 U.S. 514, 518 (1954). This is so because the "United States in instituting antitrust litigation seeks to vindicate the public interest and, in so doing, requires continuing control over the suit . . . ." United States v. American Society of Composers, Authors and Publishers, 341 F.2d 1003, 1008 (2d Cir. 1965).

With the exception of El Paso, supra, courts have almost without exception refused to recognize any right to intervene in antitrust suits. Sam Fox Publishing Co. v. United States, 366 U.S. 683, 693 (1961); Westinghouse Broadcasting Co. v. United States, 364 U.S. 518 (1960), dismissing appeal from 186 F. Supp. 776 (E.D. Pa. 1960); United States v. American Society of Composers, Authors and Publishers, 341 F.2d 1003, 1007 (2d Cir. 1965); Commonwealth Edison Co. v. Allis-Chalmers

Mfg. Co., 315 F.2d 564, 566 (7th Cir. 1963), cert. denied, 375 U.S. 834. 9/ The "tendency, particularly in antitrust cases, has been to deny intervention by private parties." 10/

This Court has recognized that the El Paso case "should not be read as a carte blanche for intervention by anyone . . . ." Smuck v. Hobson, 132 U.S. App. D.C. 372, 376, 408 F.2d 175, 179 (1969). The decision in El Paso has been more frequently distinguished than followed by the courts for a

---

9/ Accord, United States v. Automobile Manufacturers Association, 307 F. Supp. 617, 619 (C.D. Cal. 1970), aff'd, 397 U.S. 248; United States v. Blue Chip Stamp Co., 272 F. Supp. 432, 438 (C.D. Cal. 1967), aff'd, 389 U.S. 580 (1968); United States v. Radio Corp. of America, 186 F. Supp. 776 (E.D. Pa. 1960), appeal dismissed, 364 U.S. 518; United States v. Aluminum Co. of America, 41 F.R.D. 342, 344 (E.D. Mo. 1967), aff'd, 388 U.S. 457; Thrifty Shoppers Scrip Co. v. United States, 1968 Trade Cases ¶ 72337 (C.D. Cal. 1968), aff'd, 389 U.S. 580 (1968); United States v. Western Electric Co., 1968 Trade Cases ¶ 72415 (D.N.J. 1968), aff'd, 392 U.S. 659; Utah v. American Pipe and Construction Co., 5 CCH Trade Reg. Rep. ¶ 73143 (C.D. Cal. 1970); United States v. Atlantic Richfield Co., 5 CCH Trade Reg. Rep. ¶ 73309 (S.D.N.Y. 1970); United States v. The General Tire and Rubber Co., 5 CCH Trade Reg. Rep. ¶ 73364 (N.D. Ohio 1970); Consolidated Edison Co. of New York v. DiNapoli, 39 L.W. 2239 (S.D.N.Y. October 16, 1970).

10/ Shapiro, Some Thoughts on Intervention Before Courts, Agencies, and Arbitrators, 81 Harv. L. Rev. 721, 743 (1968).

variety of reasons. Outstanding among them is that the Supreme Court wanted to protect and insure obedience to its own previous mandate. 11/ United States v. Blue Chip Stamp Co., supra at 437; Old Colony Trust Co. v. Penrose Industries Corp., 387 F.2d 939, 941 (3d Cir. 1968); United States v. Automobile Manufacturers Association, supra at 619; Hobson v. Hansen, 44 F.R.D. 18, 25 (D.D.C. 1968); Honda v. Clark, 303 F. Supp. 213, 216 (D.D.C. 1968); 12/ but see United States v. First National Bank & Trust Co. of Lexington, 280 F. Supp. 260, 263 (E.D. Kentucky 1967).

In sum, intervention in Government antitrust suits has been granted only in exceptional circumstances and then only under an intervention proviso which permits intervention as of right. As shown, supra, the intervention provisos of the

---

11/ In United States v. El Paso Natural Gas Co., 376 U.S. 651, 662 (1964), the Court ordered divestiture without delay.

12/ Accord, United States v. Radio Corp. of America, supra; Thrifty Shoppers Scrip Co. v. United States, supra; United States v. Western Electric Co., supra; Utah v. American Pipe and Construction Co., supra; United States v. Atlantic Richfield Co., supra; United States v. The General Tire and Rubber Co., supra; Consolidated Edison Co. of New York v. DiNapoli, supra.



Clayton Act and the Federal Trade Commission Act, however, do not recognize the right of intervention, but clearly vest the Commission with discretionary authority to grant intervention.

Only if USWA can establish a right to intervene, as opposed to a discretionary privilege of intervention, can the Commission's order denying it be appealed. Brotherhood of Railroad Trainmen v. Baltimore & O. R. Co., 331 U.S. 519, 524 (1947); Sutphen Estates v. United States, 342 U.S. 19, 20 (1951); City of New York v. Consolidated Gas Co., 253 U.S. 219, 221 (1920); Interstate Broadcasting Co. v. United States, 109 U.S. App. D.C. 255, 286 F.2d 539 (1960); Virginia Petroleum Jobbers Ass'n v. Federal Power Commission, 104 U.S. App. D.C. 106, 110, 259 F.2d 921, 925 (1958); City of Houston v. Civil Aeronautics Board, 115 U.S. App. D.C. 94, 96, 317 F.2d 158, 160 (1963); Levin v. Ruby Trading Corp., 333 F.2d 592, 594 (2d Cir. 1964). For example, this Court in Interstate Broadcasting Co. v. United States, 109 U.S. App. D.C. at 257, 286 F.2d at 541, quoted the Supreme Court in Brotherhood of Railroad Trainmen v. Baltimore & O. R. Co., 331 U.S. at 524, as follows:

The permissive nature of such [discretionary] intervention necessarily implies that, if intervention is denied, the applicant is not legally bound or prejudiced by any judgment that might be entered in the case. He is at liberty to assert and protect his interests in some more appropriate proceeding. Having no adverse effect upon the applicant, the order denying intervention accordingly falls below the level of appealability. But where a statute or the practical necessities grant the applicant an absolute right to intervene, the order denying intervention becomes appealable. Then it may fairly be said that the applicant is adversely affected by the denial, there being no other way in which he can better assert the particular interest which warrants intervention in this instance.

It is accordingly clear that the Commission's order denying USWA intervention as a party is not judicially reviewable. 13/

---

13/ USWA's reliance on several provisions of the Administrative Procedure Act (Pet. Br. 8, 11-12, 17-18, 20, 21-22) is misplaced. First, the Administrative Procedure Act does not supersede specific statutes dealing with intervention; and second, the Administrative Procedure Act, 5 U.S.C. § 701, specifically exempts the availability of judicial review when agency action is committed to agency discretion.

Furthermore, the Administrative Procedure Act, in providing for judicial review of agency action, does not extend jurisdiction of the court of appeals to cases not otherwise within its competence. Kansas City Power & Light Co. v. McKay, 96 U.S. App. D.C. 273, 281-82, 225 F.2d 924, 932-33 (1955), cert. denied, 350 U.S. 884; see United Gas Pipe Line Co. v. Federal Power Commission, 86 U.S. App. D.C. 314, 318, 181 F.2d 796, 800 (1950), cert. denied, 340 U.S. 827. See also Commission's Memorandum in support of its pending motion to dismiss, at pages 7-8.

III. USWA is Not an "Aggrieved" Party as a  
Result of the Denial of Full Intervention,  
It Has Failed to Show Good Cause, and the  
Commission Did Not Abuse Its Discretion

If, contrary to our prior contentions, a Commission determination under the intervention proviso of the amended Clayton Act is judicially reviewable, USWA has not been "adversely affected or aggrieved," it has failed to show the "good cause" required by statute, and the Commission did not abuse its discretion. The standards or criteria necessary (a) to qualify one as an "aggrieved" party within the meaning of 5 U.S.C. § 702, (b) to establish "good cause" under 15 U.S.C. § 21(b), and (c) to show an abuse of discretion within the proviso of 5 U.S.C. § 706, differ in each instance. They may be discussed collectively here, nonetheless, since they involve the same substantive issue, namely, the availability of judicial review to USWA of an ultimate Commission decision.

The Commission has granted USWA essentially all of the rights of an intervenor at the appellate stage of a Commission proceeding, including the filing of a brief and participation in oral argument. As conceded in its brief, "USWA was denied only one of the objectives which it hoped to achieve by intervention: the acquisition of party status, and the assurance, which such status would have provided, that USWA would be able to seek judicial review if the FTC ultimately affirms the hearing examiner's Initial Decision" (Pet. Br. 7-8, 16-17). It follows that, if there is no right of judicial review of a Commission decision dismissing the complaint,

USWA is not "aggrieved" by a denial of party status; that it has failed to show "good cause" in support of its only objective which the Commission denied; and that, accordingly, the Commission did not abuse its discretion.

Judicial review of ultimate Commission orders is limited by the Federal Trade Commission Act, 15 U.S.C. § 45(c), and the Clayton Act, 15 U.S.C. § 21(c), to orders to cease and desist issued under those statutes. Should the Commission issue an order to cease and desist in a pending proceeding against a respondent, the latter has a clear statutory right to obtain a review of the Commission's decision in an appropriate court of appeals, and the jurisdiction of that court is expressly made "exclusive" under those statutes. 15 U.S.C. § 45(d); 15 U.S.C. § 21(d). USWA may, to the extent permitted by Rule 29 of the Federal Rules of Appellate Procedure, apply for leave to participate in such review proceeding. However, ultimate Commission orders which dismiss a complaint are not reviewable.

Unlike the above-noted statutory provisions which apply to adjudicative proceedings of the Federal Trade Commission, several statutes relating to certain other administrative

agencies provide for judicial review by parties who are "adversely affected or 'aggrieved.'" <sup>14/</sup> This further distinguishes <sup>15/</sup> cases such as United Church of Christ v. Federal Communications Commission, 123 U.S. App. D.C. 328, 359 F.2d 994 (1966); National Coal Association v. Federal Power Commission, 89 U.S. App. D.C. 135, 191 F.2d 462 (1951); Virginia Petroleum Jobbers Ass'n v. Federal Power Commission, 104 U.S. App. D.C. 106, 259 F.2d 921 (1958); Juarez Gas Co. v. Federal Power Commission, 126 U.S. App. D.C. 167, 375 F.2d 595 (1967).

The legislative history of the Clayton Act and the Federal Trade Commission Act clearly shows that Congress fully intended to deny anyone, except a party against whom a cease-and-desist order is issued, the right to appeal a Commission decision on the merits.

To be sure, the Supreme Court and this Court have held that "only upon a showing of 'clear and convincing evidence' of a contrary legislative intent should the courts restrict

---

<sup>14/</sup> See Davis, Administrative Law, § 22.03 (1958).

<sup>15/</sup> See discussion, supra, pp. 18-20.

access to judicial review." Abbott Laboratories v. Gardner, 387 U.S. 136, 141 (1967); Rusk v. Cort, 369 U.S. 367, 379-80 (1962); National Welfare Rights Organization v. Finch, \_\_\_\_\_ U.S. App. D.C. \_\_\_\_\_, 429 F.2d 725, 735 (1970); Environmental Defense Fund, Inc. v. Hardin, \_\_\_\_\_ U.S. App. D.C. \_\_\_\_\_, 428 F.2d 1093, 1098 (1970); see also, Citizens Committee for Hudson Valley v. Volpe, 425 F.2d 97, 101 (2d Cir. 1970). 16/ Indeed, some of these cases further hold that the "mere fact that some acts are made reviewable should not suffice to support an implication of exclusion as to others." Abbott Laboratories v. Gardner, 387 U.S. at 141; National Welfare Rights Organization v. Finch, \_\_\_\_\_ U.S.App. D.C. at \_\_\_\_\_, 429 F.2d at 736.

However, the legislative history of the Clayton Act, as well as that of the Federal Trade Commission Act, unequivocally reveals the intent of Congress and, therefore, satisfies the above-stated command of "clear and convincing evidence . . . of legislative intent" restricting judicial review and intervention.

---

16/ See also, Data Processing Service v. Camp, 397 U.S. 150, 157 (1970); Barlow v. Collins, 397 U.S. 159, 166 (1970); Tooahnippah v. Hickel, 397 U.S. 598, 606 (1970).

During the debate on the proposed Federal Trade Commission Act on July 30, 1914, Senator Pomerene offered an amendment to Section 5 which would have allowed persons other than respondents, including complainants, to obtain review of any final order of the Commission. The relevant provision provided (51 Cong. Rec. 12993 (1914)):

Any party to any proceedings brought under the provisions of this section, including the person upon whose complaint such proceedings shall have begun, if begun on such complaint, as well as the United States, by and through the Attorney General thereof, may obtain review of any final order made by such commission . . . .

Senator Walsh, in support of the amendment, stated,

inter alia:

\* \* \* this amendment gives a right of review to the man who makes the complaint, and it gives a right of review to the Government of the United States . . . if one complains before the Commission of unfair practices pursued against him . . . and the Commission decides against him, determining that the practice complained of is not unlawful, that it is not unfair competition, and dismisses his complaint, that ends the matter as to him. He can never be heard in a court at all upon his complaint. On the other hand, if the decision goes against the corporation and it is adjudged to be guilty . . . it may have a review in the courts [51 Cong. Rec. 13053 (1914)].

The amendment, however, was rejected, 51 Cong. Rec. 13318 (1914).



Senator Pomerene immediately offered a new amendment which was modeled after the Interstate Commerce Act providing for the right to appear and be made a party to the case and for a right of review, 51 Cong. Rec. 13318 (1914). However, the Federal Trade Commission Act was passed without Senator Pomerene's amendment, 38 Stat. 717-719 (1914).

The history of the comparable provisions of the Clayton Act had a similar background. An amendment was proposed which would have provided, inter alia:

Any party to any proceeding brought under the provision of this section before either the Interstate Commerce Commission or the Federal Trade Commission, including the person upon whose complaint such proceeding shall have been begun, as well as the United States by and through the Attorney General thereof, may appeal from any final order made by either of such Commissions to any court . . . . [51 Cong. Rec. 14224 (1914).]

However, the amendment was rejected. Senator Walsh explained:

\* \* \* the Clayton bill provided for the broad review of the order. It is well known likewise that I advocated the substitution of the procedure prescribed by this bill for the procedure prescribed by the trade commission bill. I argued as well as I could in favor of the principle embodied in this measure, . . . but I was defeated in that effort. The Senate expressed its views. The Senate having once decided upon the matter, I do not care to go over the ground again and

argue the same matters the second time. Thus I have endeavored to harmonize the provisions . . . that all of the proceedings under sections 8 and 9 shall be exactly as provided under section 5 of the trade commission bill. [51 Cong. Rec. 14224.]

The legislative intent is accordingly clear that judicial review is restricted to that expressly provided for by statute and that no appeal lies from a Commission order dismissing a complaint.

Therefore, USWA having only shown that it sought intervention as a party for the purpose of seeking judicial review of the Commission's ultimate decision on the merits has failed to show the "good cause" required by 5 U.S.C. § 21(b). The foregoing discussion also shows that the Commission clearly did not abuse its discretion when it allowed USWA full participation in the proceeding before the Commission without according it full party status. It is also clear that USWA has not been "adversely affected or aggrieved by agency action" within the meaning of 5 U.S.C. § 702, providing for judicial review of agency action.

Moreover, "a would-be intervenor whose application to intervene has been denied is not a party to the full proceeding upon the merits and is not aggrieved, within the statutory

meaning, at the time or upon the occasion of the entry of the final order by the Commission on the merits." Public Service Commission of N.Y. v. Federal Power Commission, 109 U.S. App. D.C. 66, 70, 284 F.2d 200, 204 (1960).

The Commission, therefore, properly denied USWA full intervention as a party in its order of August 28, 1970.

#### IV. USWA as a Complainant Cannot be a Party to the Proceeding

USWA has admitted that it "strongly [urged] the FTC to issue a complaint challenging the acquisition" (Pet. Br. 3). Furthermore, USWA's motion to intervene as a party states, "[t]he majority of the bargaining unit copper employees of Respondent Kennecott Copper Corporation are represented by USWA" (App. 12). Indeed, among the reasons for intervention, USWA has interjected labor-related issues such as employment and living conditions of its union members and the ability of a corporation to withstand strikes by its employees (App. 16-17). Although USWA, realizing that "these evils are not subject to correction by the Commission," has not otherwise raised these issues as a participant before the Commission, USWA has revealed that "they reinforce USWA's

determination to secure Kennecott's divestiture of Peabody" (App. 16). But it is clear that in proceedings under Section 7 of the amended Clayton Act, social or economic considerations such as those described above are not relevant. The sole criterion is the potential lessening of competition in the industry. United States v. Philadelphia Nat. Bank, 374 U.S. 321, 371 (1963).

The foregoing strongly suggests that USWA's interest in this proceeding may go beyond that of the public or the consumer. Accordingly, when USWA was denied party status, the Commission properly followed the mandate of the Supreme Court expressed in Federal Trade Commission v. Klesner, 280 U.S. 19, 25-26 (1929), and in Amalgamated Workers v. Edison Co., 309 U.S. 261, 268 (1940), relating to Section 5 of the Federal Trade Commission Act, but equally applicable to the present situation:

Section 5 of the Federal Trade Commission Act does not provide private persons with an administrative remedy for private wrongs. The formal complaint is brought in the Commission's name; the prosecution is wholly that of the Government; and it bears the entire expense of the prosecution. A person who deems himself aggrieved by the use of an unfair method of competition is not given the right to institute before the Commission a complaint against the alleged wrongdoer. Nor may the Commission

authorize him to do so. He may of course bring the matter to the Commission's attention and request it to file a complaint. But a denial of his request is final. And if the request is granted and a proceeding is instituted, he does not become a party to it or have any control over it. [Emphasis supplied.]

#### SUMMARY

The asserted "right" of full intervention must be considered in the light of (a) the discretionary language employed in the statute, (b) the fact that a Commission proceeding is an adversary one comparable to an antitrust proceeding in the district courts in which intervention is generally not permitted, (c) the fact that the legislative intent of the statute clearly precludes judicial review of an ultimate decision by third parties, and (d) judicial and legislative directives disallowing party status to private parties with private wrongs. The conclusion is compelling, therefore, that a Commission determination dealing with intervention is committed to its discretion and judicially not reviewable.

#### CONCLUSION

Wherefore, it is respectfully submitted that the petition for review be dismissed and the Commission's order denying

USWA full intervention as a party in the pending administrative proceeding be sustained.

JOSEPH MARTIN, JR.

General Counsel

HAROLD D. RHYNEDANCE, JR.

Assistant General Counsel

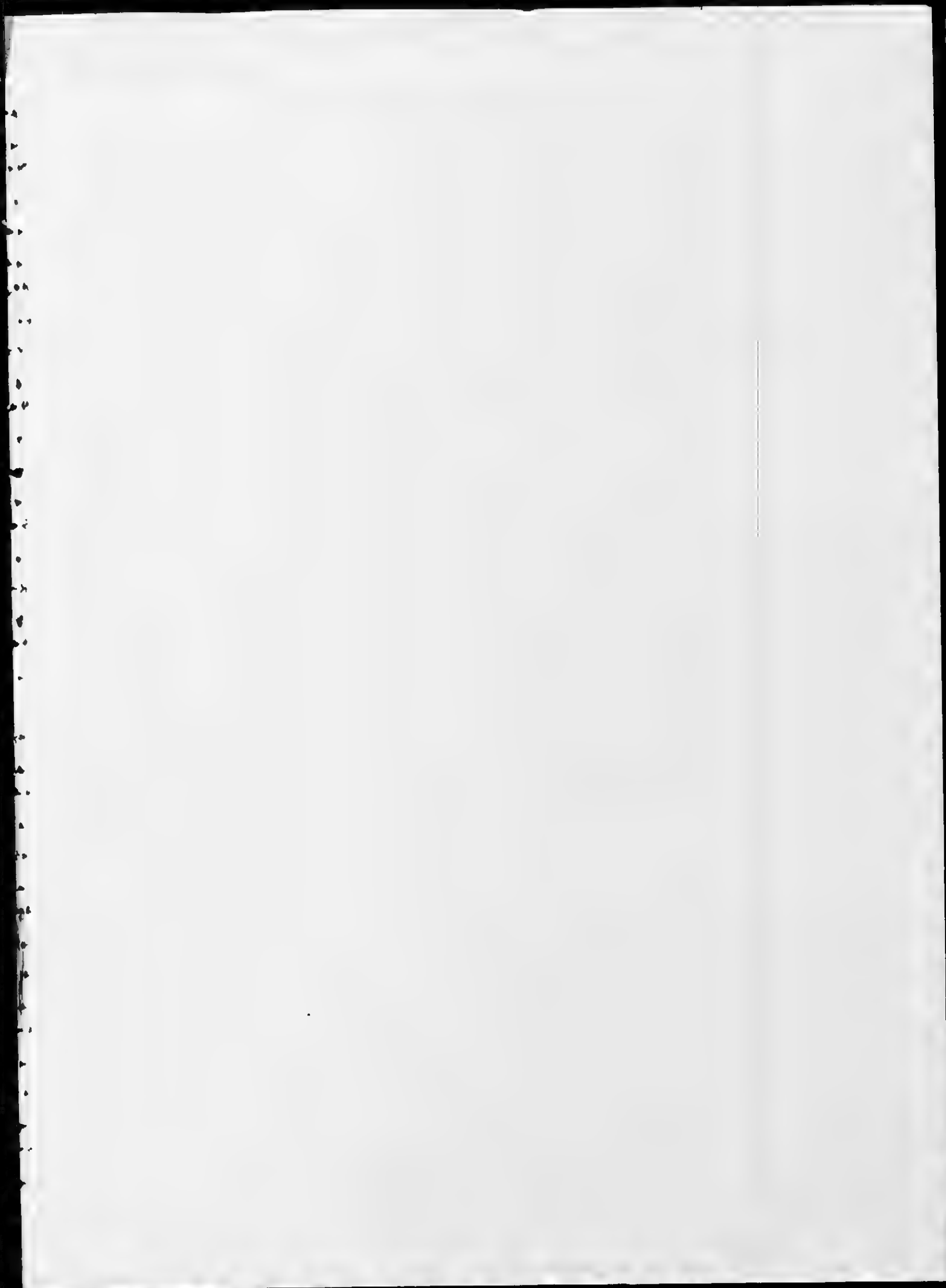
KARL H. BUSCHMANN

Attorney

Attorneys for the Federal Trade Commission

Washington, D.C. 20580

January 1971





---

---

**United States Court of Appeals**

FOR THE  
DISTRICT OF COLUMBIA CIRCUIT

---

**No. 24,629**

---

UNITED STEELWORKERS OF AMERICA, AFL-CIO,  
*Petitioner,*

v.

FEDERAL TRADE COMMISSION,  
*Respondent,*  
KENNECOTT COPPER CORPORATION,  
*Intervenor.*

---

ON PETITION FOR REVIEW OF AN ORDER OF THE  
FEDERAL TRADE COMMISSION

---

---

---

**BRIEF OF INTERVENOR  
KENNECOTT COPPER CORPORATION**

---

---

ARTHUR H. DEAN,  
SULLIVAN & CROMWELL,  
48 Wall Street,  
New York, New York 10005.

WILLIAM SIMON,  
HOWREY, SIMON, BAKER & MURCHISON,  
1707 H Street, Northwest,  
Washington, D. C. 20006.  
*Attorneys for Kennecott Copper  
Corporation*

ROY H. STEYER,  
JOHN BODNER, JR.,  
JOHN L. WARDEN,  
FRANCIS A. O'BRIEN,  
*Of Counsel.*

January 11, 1971

U. S. Court of Appeals

---

---

FILED JAN 14 1971

*Nathan J. Paulson*  
CLERK



## TABLE OF CONTENTS

	PAGE
Issues Presented for Review .....	1
Summary Statement .....	3
Argument	
I. This Court Does Not Have Jurisdiction To Consider the Steelworkers' Petition for Review	6
II. The Commission's Rulings on the Steelworkers' Motions To Intervene Were Clearly Within Its Statutory Discretion .....	9
Conclusion .....	16
Excerpts from Senate Debate of the Federal Trade Commission Act and the Clayton Act, 63rd Con- gress, 2nd Session .....	
	1a

## TABLE OF AUTHORITIES CITED

### CASES

<i>Amalgamated Utility Workers v. Consolidated Edison Co.</i> , 309 U. S. 261 (1940) .....	15
<i>Ex parte Bollman</i> , 8 U. S. (4 Cranch) 75 (1807) ..	6
* <i>Carroll v. United States</i> , 354 U. S. 394 (1957) ...	6
<i>Cascade Natural Gas Corp. v. El Paso Natural Gas Co.</i> , 386 U. S. 129 (1967) .....	10, 11
* <i>City of Dallas v. Rentzel</i> , 172 F. 2d 122 (5th Cir.), cert. denied 338 U. S. 858 (1949) .....	7
<i>Environmental Defense Fund, Inc. v. Hardin</i> , 428 F. 2d 1093 (D. C. Cir. 1970) .....	8

\*Cases principally relied on are starred.

	PAGE
* <i>FTC v. Klesner</i> , 280 U. S. 19 (1929) .....	14
* <i>Harry Waller v. FTC</i> , Order No. 11741 (4th Cir., Dec. 6, 1967) .....	14
<i>National Coal Ass'n v. FPC</i> , 89 U. S. App. D. C. 135, 191 F. 2d 462 (1951) .....	10
<i>National Welfare Rights Organization v. Finch</i> , 429 F. 2d 725 (D. C. Cir. 1970) .....	10
<i>Palisades Citizens Ass'n v. CAB</i> , 136 U. S. App. D. C. 346, 420 F. 2d 188 (1969) .....	10, 15
* <i>Rettinger v. FTC</i> , 392 F. 2d 454 (2d Cir. 1968) ..	7, 8
* <i>Robertson v. FTC</i> , 415 F. 2d 49 (4th Cir. 1969) ..	7, 8
* <i>Schwab v. Quesada</i> , 284 F. 2d 140 (3d Cir. 1960) .	7
<i>Smuck v. Hobson</i> , 132 U. S. App. D. C. 372, 408 F. 2d 175 (1969) .....	11
<i>Spangler v. Pasadena City Board of Education</i> , 427 F. 2d 1352 (9th Cir. 1970) .....	11
<i>Turner v. Bank of North America</i> , 4 U. S. (4 Dall.) 8 (1799) .....	6
<i>United States v. Automobile Manufacturers Ass'n</i> , 307 F. Supp. 617 (C. D. Calif. 1969), <i>aff'd mem.</i> , 397 U. S. 248 (1970) .....	11
<i>United States v. CIBA Corp.</i> , 14 Fed. Rules Serv. 2d 475 (S. D. N. Y. Sept. 8, 1970) .....	11
<i>United States v. ICC</i> , 337 U. S. 426 (1949) .....	8
UNITED STATES CONSTITUTION	
ARTICLE I .....	5
ARTICLE III .....	5, 6
STATUTES	
Administrative Procedure Act	
5 U. S. C. § 701 (Supp. V, 1970) .....	8, 14
5 U. S. C. § 702 (Supp. V, 1970) .....	7, 14
5 U. S. C. § 703 (Supp. V, 1970) .....	2, 7

\*Cases principally relied on are starred.

## Clayton Act

Section 7, 15 U. S. C. § 18 (1964) .....1, 9, 11

Section 11, 15 U. S. C. § 21 (1964) ..2, 3, 9, 11, 12, 15

## Federal Insecticide, Fungicide, and Rodenticide Act

7 U. S. C. § 135b (1964) ..... 8

## Federal Trade Commission Act

Section 5, 15 U. S. C. § 45 (1964) .....9, 15

## RULES

Federal Rules of Appellate Procedure, Rule 29 .... 15

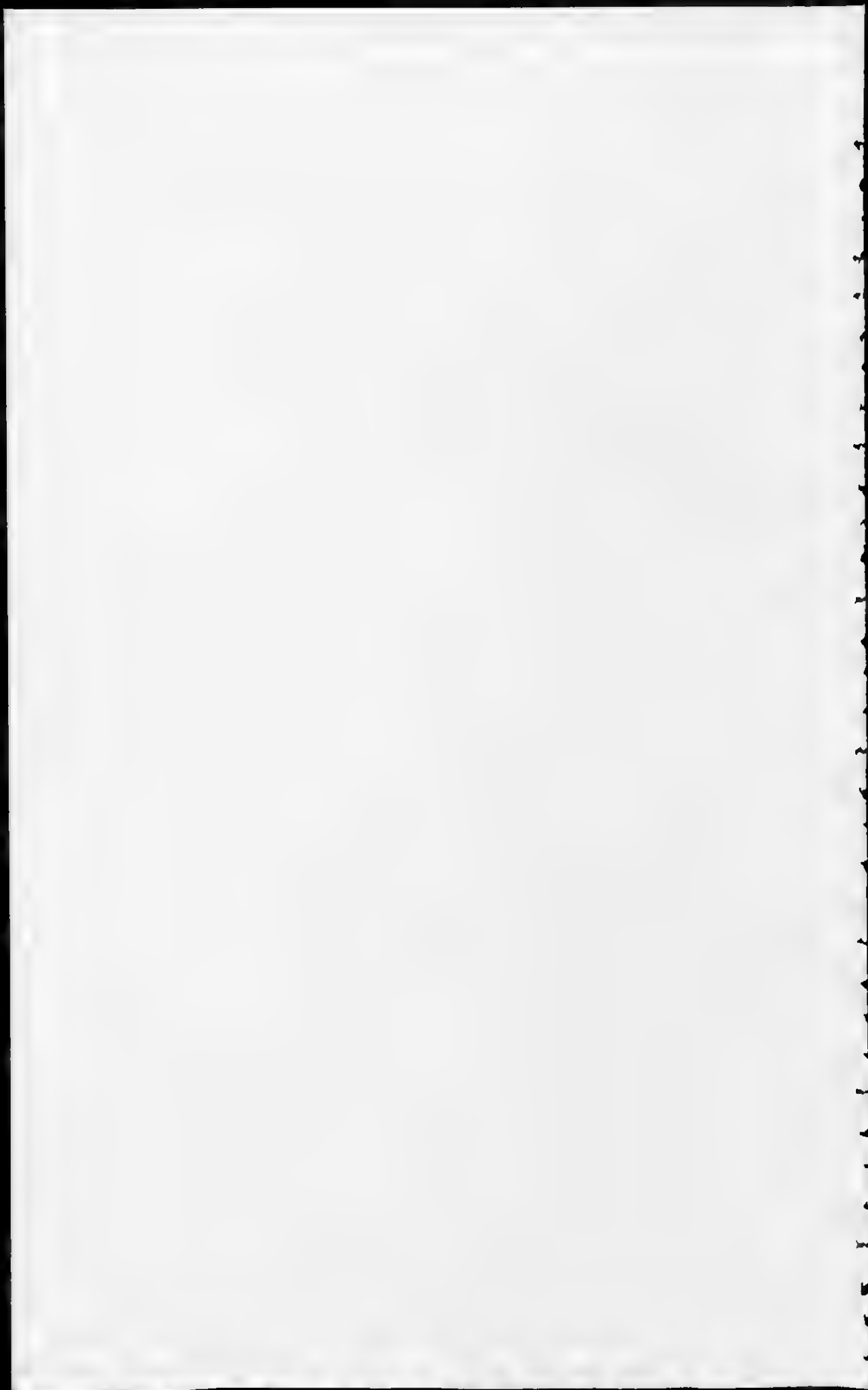
Federal Trade Commission, Rules of Practice for  
Adjudicative Proceedings § 3.14 ..... 15

## LEGISLATIVE MATERIALS

Senate Debate of the Federal Trade Commission Act  
and the Clayton Act, 63rd Cong., 2nd Sess., 51  
CONG. REC. 12,993 et seq. ....12, 1a-15a

## OTHER AUTHORITIES

3 DAVIS, ADMINISTRATIVE LAW § 22.03, at 214  
(1958) ..... 13



# United States Court of Appeals

FOR THE  
DISTRICT OF COLUMBIA CIRCUIT

---

No. 24,629

---

UNITED STEELWORKERS OF AMERICA, AFL-CIO,  
*Petitioner,*

v.

FEDERAL TRADE COMMISSION,  
*Respondent,*  
KENNECOTT COPPER CORPORATION,  
*Intervenor.*

---

ON PETITION FOR REVIEW OF AN ORDER OF THE  
FEDERAL TRADE COMMISSION

---

## BRIEF OF INTERVENOR KENNECOTT COPPER CORPORATION

---

### Issues Presented for Review

The petitioner, United Steelworkers of America, AFL-CIO ("Steelworkers"), seeks to have this Court review the denial by the Federal Trade Commission ("Commission") of the Steelworkers' application to intervene as a party in a proceeding under Section 7 of the Clayton Act, 15 U. S. C. § 18 (1964), against Kennecott Copper Corporation ("Kennecott") which is now awaiting decision by the Commission.



The Steelworkers, who were aware of that proceeding from its outset, first sought to intervene only at the time of the appeal by complaint counsel to the Commission from the Initial Decision of March 9, 1970 dismissing the complaint. The Commission permitted the Steelworkers to express their views fully on the appeal; it accepted their written brief (order of June 15, 1970) and authorized their participation in oral argument (order of August 28, 1970). It denied their further request to be made a party—a request that was ultimately based solely on the theory that such “party status” would enable them to take an appeal to a court of appeals in the event the Commission were to affirm the Initial Decision dismissing the complaint.

Kennecott filed a motion to dismiss the petition for review and a supporting memorandum, both dated October 15, 1970, on the grounds that this Court lacks jurisdiction and that the Steelworkers, in any event, would not have standing to appeal a Commission order dismissing the complaint. The Commission filed a similar motion and supporting memorandum dated November 9, 1970. After requests by the Steelworkers (dated November 9 and November 18, 1970, respectively) for further time to respond to these motions in conjunction with their brief on the appeal, the motions were referred, by order filed December 1, 1970, for consideration by the division of the Court assigned to consider this case on the merits.

Under these circumstances, the issues presented for review are:

1. Whether this Court is a “court of competent jurisdiction” to entertain the present petition for review under Section 10(b) of the Administrative Procedure Act, 5 U. S. C. § 703 (Supp. V, 1970).
2. If so, whether the Commission abused the discretionary authority with respect to intervention conferred upon it by Section 11(b) of the Clayton Act,

15 U. S. C. § 21(b) (1964), when it denied the Steelworkers' additional request to be made a party for the purpose of a claimed right of appeal which is not authorized by and is contrary to the governing statutory provisions enacted by Congress.

### SUMMARY STATEMENT

The Steelworkers waited until nearly two years after the Commission had issued its complaint against Kennecott on August 5, 1968 before seeking leave to intervene on May 20, 1970, although they had been aware of the case from the beginning and, in a letter to the Commission dated January 9, 1968, their president had "strongly urged the Commission to issue a complaint." By the time they moved, a 48-day trial had been concluded, extensive briefs had been filed and the Hearing Examiner had issued his 206-page Initial Decision of March 9, 1970. (App. 13, 27-28, 40)

In response to the Steelworkers' first two intervention motions, the Commission granted them permission to file a brief and present oral argument on complaint counsel's appeal of the Examiner's decision, but denied them formal intervention (App. 18-19, 24-25). After simultaneously filing on September 15, 1970 a petition for review in this Court and an action for a mandatory injunction in the District Court seeking to reverse the Commission's disposition of their two motions to intervene, and after the case on the merits had been argued before the Commission on October 27, 1970, the Steelworkers on December 3, 1970 filed a third motion to intervene before the Commission, which unanimously denied it on December 18, 1970 (App. 92).

In denying this motion, the Commission said:

"Movants having been granted their request to be accorded an opportunity to present their views and

arguments on the issue in this case, and movants' petition not showing any cause requiring further Commission action, the Commission has determined that the motion should be denied."

The Steelworkers continue to assert in their Brief (pp. 5-6), as in their third motion (App. 76), that they have made a "contribution" to this case. As the Commission indicated in its denial of their third motion, any alleged contribution to the Commission proceedings was completed upon their presentation of their views and arguments. The fact is, moreover, that their belated assertion that the so-called "deep pocket theory" should be applied to the challenged acquisition is predicated on an assumed set of "facts" which are without support in the record made before the Hearing Examiner and, indeed, are contrary to the actual facts established in the record—a record to which the Steelworkers neither made, nor sought to make, any contribution whatsoever. *See, e.g.*, the discussion in Respondent's Opposition to Third Motion to Intervene filed December 7, 1970, App. 85-89.

As was the case with their motions to the Commission, the Steelworkers' Brief to this Court (cited herein as "Br.") is constructed entirely on an assumed, false premise—that if the Steelworkers were made party to the proceeding before the Commission, they would have the right to seek judicial review of a final decision on the merits dismissing the complaint (*see* Br. 7-9, 16, 25-27; App. 15, 22, 76). It proceeds from that premise to marshal a series of arguments by reference to cases construing statutes quite unlike the Clayton Act, as if all acts of Congress were fungible and all administrative activity analytically identical.

Finally, almost as an afterthought, the Steelworkers' Brief comes (pp. 24-27) to the threshold question of whether this Court has jurisdiction to review the Commission's denial of their motions to intervene. Unable to point to any statu-

tory authority vesting jurisdiction in this Court, the Steelworkers in effect suggest that this Court usurp the prerogative of Congress under Article I, Section 8, and Article III, Section 1, of the Constitution to delimit judicial jurisdiction because "on balance" this case "belong[s]" here (Br. 26).

One looks in vain to find in the Steelworkers' Brief any recognition of the fact that all the cases advanced in support of their position dealt either with agencies performing licensing or other quasi-legislative functions in other than adjudicative proceedings or with actions in district courts. It offers no explanation of why doctrines developed to govern intervention and judicial review in such proceedings, based in each instance upon the particular governing rules and statutes, are applicable to a quasi-judicial adversary proceeding before the Federal Trade Commission pursuant to the Clayton Act.

The substantive issues presented by the petition in this case, if reached, must be determined by reference to the Clayton Act and its specific provisions governing intervention in Commission proceedings and judicial review of Commission decisions of an adjudicative nature. This case does not involve the different provisions on intervention and judicial review of the Federal Power Act, the Social Security Act, the Federal Insecticide, Fungicide and Rodenticide Act or the Interstate Commerce Act, or the inter-relation of any of those or other Congressional acts with the Administrative Procedure Act.

Similarly, and initially, the question of this Court's jurisdiction to entertain the present petition is not one which should be determined, as the Steelworkers urge, more or less as a matter of judicial housekeeping (Br. 24-27), but one which under the Constitution must be determined as a matter of statutory construction. And on the basis of clear and consistent precedent this jurisdictional question must be answered in the negative.

The Steelworkers have already burdened this proceeding with three motions to intervene before the Commission and actions in two courts for judicial review. Now they suggest (Br. 9 n. 8; *see also* Br. 27) that the Court hold their petition "in abeyance" pending the Commission's decision on the merits of the Section 7 case. The jurisdiction of this Court having been invoked—albeit improperly—Kennecott respectfully suggests that it is entitled to summary disposition of the Steelworkers' petition so that the repetitive litigation of this issue may be terminated.

#### POINT I

#### **THIS COURT DOES NOT HAVE JURISDICTION TO CONSIDER THE STEELWORKERS' PETITION FOR REVIEW.**

It is a basic constitutional principle that the jurisdiction of this Court, as well as that of other Federal courts (with the exception of the jurisdiction of the Supreme Court over certain classes of cases expressly enumerated in Article III of the Constitution), is entirely confined to express statutory grants. As stated by Chief Justice Warren in *Carroll v. United States*, 354 U. S. 394, 399 (1957):

"It is axiomatic, as a matter of history as well as doctrine, that the existence of appellate jurisdiction in a specific federal court over a given type of case is dependent upon authority expressly conferred by statute. And since the jurisdictional statutes prevailing at any given time are so much a product of the whole history of both growth and limitation of federal-court jurisdiction since the First Judiciary Act, 1 Stat. 73, they have always been interpreted in the light of that history and of the axiom that clear statutory mandate must exist to found jurisdiction."

*See, e.g., Turner v. Bank of North America*, 4 U. S. (4 Dall.) 8 (1799); *Ex parte Bollman*, 8 U. S. (4 Cranch) 75, 93-94 (1807).

The Steelworkers' contention (Br. 24) that Congress has conferred upon this Court jurisdiction to entertain their petition for review is premised entirely upon Section 10(b) of the Administrative Procedure Act, 5 U. S. C. § 703 (Supp. V, 1970). That section provides that a person entitled to judicial review of agency action pursuant to Section 10(a) of the Act, 5 U. S. C. § 702 (Supp. V, 1970), may, in the absence or inadequacy of a special statutory review procedure, obtain review "in a court of competent jurisdiction."

It is firmly established that a court of appeals is not "a court of competent jurisdiction" within the meaning of Section 10(b), and that an action thereunder must be brought in a district court. *Robertson v. FTC*, 415 F. 2d 49 (4th Cir. 1969); *Rettinger v. FTC*, 392 F. 2d 454 (2d Cir. 1968); *Schwab v. Quesada*, 284 F. 2d 140 (3d Cir. 1960); *City of Dallas v. Rentsel*, 172 F. 2d 122 (5th Cir.), *cert. denied*, 338 U. S. 858 (1949).

Even if the question of jurisdiction were one to be decided by the Court as a matter of policy, rather than by reference to statute, the Steelworkers' arguments that (1) "review of the *ultimate* decision of the FTC on the validity of the acquisition should be in this Court, irrespective of the outcome" (Br. 26), because "it would be irrational to say that if Kennecott *loses* before the FTC review is in the court of appeals . . . but that if Kennecott *wins* review is in the district court" (Br. 25), and (2) "it would be incongruous for this Court's assertion of jurisdiction over the FTC's final decision to have to await a district court's resolution of the intervention issue" (Br. 27) are erroneous because their assumed basic premise is fallacious. As we show in Point II, *infra*, if Kennecott wins before the Commission,

the Commission's decision is final and not reviewable by any court.<sup>1</sup>

Moreover, the two cases cited by the Steelworkers in their discussion of the question of jurisdiction—*United States v. ICC*, 337 U. S. 426 (1949), and *Environmental Defense Fund, Inc. v. Hardin*, 428 F. 2d 1093 (D. C. Cir. 1970)—had nothing whatsoever to do with the construction of either the Administrative Procedure Act or the Clayton Act.

In *United States v. ICC*, the Supreme Court held only that an action brought to review an order of the ICC denying a claim for money damages should be maintained before an ordinary single-judge district court rather than in a three-judge district court. Thus, the Court's determination was against expansion of the jurisdiction of a special court of limited jurisdiction and in favor of jurisdiction in the district court, the ordinary court of original jurisdiction in the Federal system.

This Court's decision in *Environmental Defense Fund, Inc. v. Hardin* is similarly irrelevant to the position urged by the Steelworkers. Jurisdiction in that case was founded upon an express grant, 7 U. S. C. § 135b(d) (1964), and the only jurisdictional issue even presented was whether

---

<sup>1</sup>The Steelworkers' suggestion (Br. 25) that the *Rettinger* and *Robinson* cases hold that "all" Commission orders are reviewable either in a court of appeals or a district court is spurious. In each of those cases, the court dealt only with the particular type of order before it, and there is no statutory or decisional authority for the sweeping proposition that judicial review is available in all instances. The Administrative Procedure Act itself, 5 U. S. C. § 701 (Supp. V, 1970), provides that there shall be no review of administrative action "committed to agency discretion by law" and, as we suggested in our memorandum in support of Kennecott's motion to dismiss (pages 9-11), that provision may preclude adjudication by any court even of the Steelworkers' present petition. This Court need not reach that question, however, since it plainly is an improper forum for review of any order under Section 10(b) of the Administrative Procedure Act.



the defendant Secretary of Agriculture had entered an order within the meaning of the statute, which the Court held he had.

The only statutory provisions which confer upon this Court, or any court of appeals, jurisdiction to review orders of the FTC are Section 11(c) of the Clayton Act, 15 U. S. C. § 21(c) (1964), and Section 5(c) of the Federal Trade Commission Act, 15 U. S. C. § 45(c) (1964). Both sections deal with the right to judicial review of persons required by orders of the Commission to cease and desist from violations of law, and neither is remotely applicable to this petition. Indeed, the Steelworkers make no suggestion that this Court has jurisdiction under either of these provisions.

Since the Court is without jurisdiction over the subject matter of the petition, it should be dismissed forthwith.

## POINT II

### **THE COMMISSION'S RULINGS ON THE STEELWORKERS' MOTIONS TO INTERVENE WERE CLEARLY WITHIN ITS STATUTORY DISCRETION.**

If the Court should determine that it has jurisdiction of the petition, the petition should in any event be dismissed on the merits.

Intervention in Federal Trade Commission proceedings to enforce Section 7 of the Clayton Act is governed by Section 11(b) of the Clayton Act, 15 U. S. C. § 21(b) (1964), which provides, in pertinent part:

“The Attorney General shall have the right to intervene and appear in said proceeding and any person may make application, and upon good cause shown

may be allowed by the Commission or Board, to intervene and appear in said proceeding by counsel or in person."

This provision is plain—the Attorney General is entitled to intervene as of right, and others may be permitted by the Commission to intervene upon a showing of good cause. *Cf. Palisades Citizens Ass'n v. CAB*, 136 U. S. App. D. C. 346, 351, 420 F. 2d 188, 193 (1969). The Steelworkers' argument (Br. 9-13) that they have a "right" to intervene before the Commission thus serves only to confuse, as they obviously have no express statutory right to do so.

Moreover, none of the cases on which they rely was decided under a statutory provision making a clear distinction between intervention as of right and permissive intervention, as does the Clayton Act. Some involved situations where there was no express statutory provision dealing with intervention (*e.g.*, *National Welfare Rights Organization v. Finch*, 429 F. 2d 725 (D. C. Cir. 1970)), and others involved interacting intervention and judicial review provisions where the language of the intervention provision was arguably entirely permissive but, when considered in light of the judicial review section and the basic legislative scheme, clearly contemplated intervention as of right by certain described classes of persons (*e.g.*, *National Coal Ass'n v. FPC*, 89 U. S. App. D. C. 135, 191 F. 2d 462 (1951)).

Nor do any of the cases even remotely suggest that a person who might otherwise have a right to intervene as a party to litigate the merits of an action may, as a matter of course and with no showing of justification for delay, exercise that right after conclusion of the trial on the merits and filing of a decision.

*Cascade Natural Gas Corp. v. El Paso Natural Gas Co.*, 386 U. S. 129 (1967), upon which the Steelworkers

rely for the proposition that intervention by consumer representatives in a Section 7 case is a matter of right (Br. 13), was decided under the Federal Rules of Civil Procedure, not Section 11(b) of the Clayton Act, and dealt solely with intervention in a proceeding to frame relief. Under the dual enforcement system provided by Congress, Section 7 cases are conducted before the district courts and the Commission under different discovery and trial procedures as well as under different provisions for intervention and appeal.

In any event, the Supreme Court was concerned in *Cascade* with an apparent departure from its own mandate, and the courts have consistently recognized that the ruling in *Cascade* is "sui generis and must be limited to the facts of that case." *United States v. Automobile Manufacturers Ass'n*, 307 F. Supp. 617, 619 n. 3 (C. D. Calif. 1969), *aff'd mem. sub nom. City of New York v. United States*, 397 U. S. 248 (1970); *accord*, *United States v. CIBA Corp.*, 14 Fed. Rules Serv. 2d 475 (S. D. N. Y. Sept. 8, 1970), and cases reviewed therein at 478-79; *see also Smuck v. Hobson*, 132 U. S. App. D. C. 372, 376, 408 F. 2d 175, 179 (1969); *Spangler v. Pasadena City Board of Education*, 427 F. 2d 1352, 1354 n. 3 (9th Cir. 1970).

The Steelworkers' basic contention (Br. 7-9, 15-23) is that they have (or would have if permitted to intervene) a right to seek judicial review of a Commission decision dismissing the complaint and, therefore, must have a corresponding right to intervene. But, in fact, the Steelworkers have no right to judicial review of a final Commission decision favorable to Kennecott whether or not they are a party to the proceeding before the Commission.

Unlike the sundry cases discussed throughout the Steelworkers' Brief, judicial review of a final Commission decision in a Clayton Act adjudicative proceeding is not governed by the Administrative Procedure Act or a similar

statutory provision granting a right to review to "adversely affected" or "aggrieved" parties, but is controlled by the express provisions of Section 11 of the Clayton Act, 15 U. S. C. § 21 (1964).

Subsection (c) of Section 11 expressly provides:

"Any person required by such order of the commission or board to cease and desist from any such violation may obtain a review of such order in the court of appeals of the United States for any circuit within which such violation occurred or within which such person resides or carries on business, by filing in the court, within sixty days after the date of the service of such order, a written petition praying that the order of the commission or board be set aside."

No provision is made for any person to obtain judicial review of a final decision of the Commission holding that no violation of law has been proved and that the complaint shall be dismissed. The legislative history of the Clayton Act and the analogous Federal Trade Commission Act confirm that Congress clearly intended such a limitation of the right to judicial review of a final Commission decision.

In Senate debate on the Federal Trade Commission Act, it was proposed on two occasions to amend Section 5 to allow the person who originally complained to the Commission to obtain judicial review of any action by the Commission dismissing his complaint. This amendment was rejected by the Senate, and when a similar amendment to the Clayton Act came on for debate in the Senate, it was immediately replaced by an amendment providing for the more narrow review contained in the FTC Act. Appropriate excerpts from the debates on the two acts are appended at the end of this brief (pages 1a through 15a).

The limited provisions for judicial review (and for intervention as well) which Congress has provided in the case of Federal Trade Commission adjudicative proceedings, as contrasted with other types of proceedings before other agencies,<sup>2</sup> represents a recognition of the fundamental differences among various kinds of agency action.

Unlike other administrative agencies such as the FPC, FCC, ICC or CAB, the Commission does not issue licenses or permits, certify activities of public utilities or common carriers, or examine the performance and plans of other regulated businesses. Proceedings before the Commission are not initiated by private parties seeking the grant of a benefit from the public. On the contrary, the Commission in its adjudicative function is an enforcement body combining the functions of prosecutor and judge, and as such it institutes proceedings against a person when it has reason to believe that person has violated a statute enforced by the Commission.

Congress has provided that if after trial the Commission concludes that a violation has occurred and enters a cease and desist order, the person subject to the order may challenge it in a Court of Appeals. Congress has not provided that members of the public may seek to have a court sit in review of a Commission determination after trial that, despite the "reason to believe" on which the Commission's complaint was issued, grounds do not in fact exist for the entry of a cease and desist order in a particular case.

Consequently, the Steelworkers' reliance (Br. 11-12) upon the Administrative Procedure Act as granting them a right to judicial review of a Commission decision dismissing its complaint against Kennecott is mistaken. The Act does not provide for review in a court of appeals (*see* Point I, *supra*), and district court review would be contrary to the whole statutory scheme of dual enforce-

---

<sup>2</sup>Professor Davis has noted that the FTC Act, which is identical in this respect to the Clayton Act, contains the "narrowest provision" for judicial review of any of the statutes "governing leading federal agencies." 3 DAVIS, ADMINISTRATIVE LAW § 22.03, at 214 (1958).

ment—indeed, even the Steelworkers admit it would be “irrational” (Br. 25). Whether viewed as “precluding judicial review” of the Commission’s dismissal of a complaint, as committing a dismissal to “agency discretion” (*see* Section 10 of the Administrative Procedure Act, 5 U. S. C. § 701 (Supp. V, 1970)), or as determining that no person is “adversely affected” or “aggrieved” by the Commission’s dismissal of its own complaint any more than by the Commission’s refusal to issue a complaint (*see* Section 10(a) of the Administrative Procedure Act, 5 U. S. C. § 702 (Supp. V, 1970)), the Clayton Act prevents challenge of such a dismissal in the courts.

Thus, in *Harry Waller v. FTC*, Order No. 11741 (4th Cir., Dec. 6, 1967), where a complainant sought review of a decision of the Commission dismissing a complaint after trial on the merits, the Fourth Circuit dismissed the petition for review for lack of jurisdiction (*see* the order attached to Memorandum in Support of Kennecott’s Motion to Dismiss the Petition for Review, filed on October 15, 1970).

Considering the Federal Trade Commission Act, whose provisions regarding adjudicative proceedings and judicial review are virtually identical to those of the Clayton Act, the Supreme Court held in *FTC v. Klesner*, 280 U. S. 19, 25-26 (1929) (footnotes omitted):

“A person who deems himself aggrieved by the use of an unfair method of competition is not given the right to institute before the Commission a complaint against the alleged wrongdoer. Nor may the Commission authorize him to do so. He may of course bring the matter to the Commission’s attention and request it to file a complaint. But a denial of his request is final. And if the request is granted and a proceeding is instituted, he does not become a party to it or have any control over it.”

*Cf. Amalgamated Utility Workers v. Consolidated Edison Co.*, 309 U. S. 261, 268 (1940).

In the end, if the Court should find that it has jurisdiction to entertain the Steelworkers' petition for review, the sole question presented for decision is whether, in light of all relevant circumstances, the Commission's rulings on the Steelworkers' motions to intervene were abuses of its statutory discretion. Clearly they were not.

Implementing the intervention provisions of Section 5(b) of the Federal Trade Commission Act and Section 11(b) of the Clayton Act, Section 3.14 of the Commission's Rules of Practice for Adjudicative Proceedings provides that, upon proper application pursuant to the applicable Act, "The hearing examiner or the Commission may by order permit the intervention to such extent and upon such terms as are provided by law or as otherwise may be deemed proper."

In response to the Steelworkers' first two motions to intervene, the Commission granted the Steelworkers permission to file a brief and to participate in oral argument on the appeal from the Hearing Examiner's decision, treatment analogous to—and even more generous than—that generally afforded an *amicus curiae* on appeals to the courts of appeals. See Federal Rules of Appellate Procedure, Rule 29. Surely no proposition of logic or policy required the Commission to go further. Indeed, the rulings of the Commission which Steelworkers attack represented a more generous accommodation of their alleged interest in the proceeding than might reasonably have been required by their belated application to intervene after the issuance of the Hearing Examiner's decision. Cf. *Palisades Citizens Ass'n v. CAB*, 136 U. S. App. D. C. 346, 420 F. 2d 188 (1969).

Having been in fact given all the rights of one intervening at the appellate level before the Commission, the Steelworkers' demand for "party status" is predicated



wholly on the argument that they would thereby ensure their "right" to obtain judicial review of a final decision dismissing the complaint—a "right" that, as we have shown, would not in any event exist.

### CONCLUSION

The petition should be dismissed for want of jurisdiction, or, if the Court should determine that jurisdiction is proper, the petition should be dismissed on the merits.

Respectfully submitted,

ARTHUR H. DEAN,  
SULLIVAN & CROMWELL,  
48 Wall Street.  
New York, New York 10005.

WILLIAM SIMON,  
HOWREY, SIMON, BAKER & MURCHISON,  
1707 H Street, Northwest,  
Washington, D. C. 20006.  
*Attorneys for Kennecott Copper  
Corporation*

ROY H. STEYER,  
JOHN BODNER, JR.,  
JOHN L. WARDEN,  
FRANCIS A. O'BRIEN,  
*Of Counsel.*

January 11, 1971

**Excerpts from Senate Debate of  
the Federal Trade Commission Act and the Clayton Act,  
63rd Congress, 2nd Session**

---

**FEDERAL TRADE COMMISSION ACT**

JULY 30, 1914:

**FEDERAL TRADE COMMISSION.**

The Senate, as in Committee of the Whole, resumed the consideration of the bill (H. R. 15613) to create an interstate trade commission, to define its powers and duties, and for other purposes.

\* \* \*

Mr. POMERENE. I ask that the amendment which I sent to the desk a little while ago be now laid before the Senate.

\* \* \*

The PRESIDENT pro tempore. The Senator from Ohio offers an amendment as a substitute for section 5, which will be read.

The SECRETARY. In lieu of section 5 it is proposed to insert:

SEC. 5. That unfair competition in commerce is hereby declared unlawful. The commission is hereby empowered and directed to prevent corporations from using unfair methods of competition in commerce.

Whenever the commission, either upon information furnished by its agents or employees, or upon complaint duly verified by affidavit of any interested person, has reason to believe that any corporation is violating any of the provisions of this section, it shall issue and cause to be served a notice accompanied with a written statement of the violation charged upon such corporation, which shall thereupon be called upon within a reasonable time fixed in such notice, not to exceed 30 days thereafter, to appear and show cause why an order should not issue to restrain and prohibit the violation charged, and upon a hearing held pursuant to such notice the commission shall make and file its findings of fact and conclusions of law, and if it shall appear that such corporation is guilty of the violation charged, then the commission shall issue and cause to be served on

such corporation an order commanding it forthwith to cease and desist from such violation within the time and in the manner prescribed in such order. Any such order may be modified or set aside at any time by the commission issuing it for good cause shown.

\* \* \*

Any party to any proceedings brought under the provisions of this section, including the person upon whose complaint such proceedings shall have been begun, if begun on such complaint, as well as the United States, by and through the Attorney General thereof, may obtain a review of any final order made by such commission in any district court having jurisdiction to enforce any order which might have been made in the proceeding by such commission as hereinbefore provided, by serving notice upon the adverse party, if there be one, and filing the same with the said commission at any time within 30 days from the date of the entry of the order to be reviewed, and thereupon the same proceedings shall be had as are prescribed herein in the case of an application for the enforcement of an order made by the commission.

51 CONG. REC. 12,993

\* \* \*

Mr. POMERENE. Mr. President, perhaps I ought to say that in the main the principles contained in the first amendment I offered and in the amendment just now proposed and in the Clayton bill are in substance the same. The differences are rather in detail. The pending amendment provides that, either upon information gathered by the commission through its agents and representatives or upon the complaint of some one else, duly certified, setting forth the fact that a corporation has been guilty of unfair methods of competition, a notice shall be served upon such corporation, with a copy of the written complaint, requiring it to show cause within 30 days why an order should not be made compelling it to desist from further unfair methods of competition.

\* \* \*

There is also a provision whereby the accused corporation, if it feels aggrieved, can file its application in a similar way in the district court for a review of the findings of the commission.

The party that files the complaint and the United States, by its Attorney General, also have the right to ask for a review. Provision is made in case of disobedience of the order of the commission for enforcing it by contempt proceedings.

51 CONG. REC. 12,994

\* \* \*

JULY 31, 1914:

#### FEDERAL TRADE COMMISSION.

The Senate, as in Committee of the Whole, resumed the consideration of the bill (H. R. 15613) to create an interstate trade commission, to define its powers and duties, and for other purposes.

\* \* \*

The PRESIDENT pro tempore. The pending amendment is the amendment offered by the Senator from Ohio [Mr. POMERENE].

\* \* \*

Mr. CUMMINS. My amendment covers the same subject as the amendment of the Senator from Ohio. I offer it as a substitute for the amendment proposed by the Senator from Ohio.

51 CONG. REC. 13,044

\* \* \*

The PRESIDENT pro tempore. The amendment to the amendment will be stated.

The SECRETARY. In lieu of the amendment proposed by Mr. POMERENE it is proposed to insert the following:

SEC. 5. That unfair competition in commerce is hereby declared unlawful.

The commission shall have authority to prevent such unfair competition in commerce in the manner following, to wit:

Whenever it shall have reason to believe that any person, partnership, or corporation is violating the provisions of this section it shall issue and serve upon the defendant a complaint stating its charges in that behalf and at the same time a notice of hearing upon a day and at a place therein fixed. The person, partnership, or corporation so complained of shall have the right to appear at the place and time so fixed and show cause why an order should not be entered by the commission requiring such person, partnership, or corporation to cease and desist from the violation of the law so charged in said complaint.

If upon such hearing the commission shall find that the person, partnership, or corporation named in the complaint is practicing such unfair competition it shall thereupon enter its findings of record and issue and serve upon the offender an order requiring that within a reasonable time to be stated in said order that the offender shall cease and desist from such unfair competition. The commission may at any time set aside, in whole or in part, or modify its findings or order so entered or made. Any suit brought by any such person, partnership, or corporation to annul, suspend, or set aside, in whole or in part, any such order of the commission shall be brought against the commission in a district court of the United States in the judicial district of the residence of the person or of the district in which the principal office or place of business is located and the procedure set forth in the act of Congress making appropriations to supply urgent deficiencies and insufficient appropriations for the fiscal year of 1913 and for other purposes relating to suits brought to suspend or set aside, in whole or in part, an order of the Interstate Commerce Commission shall apply.

51 CONG. REC. 13,045

\* \* \*

Mr. WALSH. Mr. President, the principal question presented by the amendment offered by the Senator from Ohio [Mr. POMERENE] touches the review of any order which may be made by the commission. At least the essential difference between the amendment offered by the Senator

from Iowa and the amendment offered by the Senator from Ohio concerns the matter of the review and the extent of the review of such order.

51 CONG. REC. 13,052

\* \* \*

Another point to which I wish to call attention is that this [POMERENE] amendment gives a right of review to the man who makes the complaint, and it gives a right of review to the Government of the United States. You will understand that under the provision as it stands and under the amendment offered by the Senator from Iowa, if one complains before the commission of unfair practices pursued against him by which his business is being ruined, by which he is being wrongfully driven out of the market, and the commission decides against him, determining that the practice complained of is not unlawful, that it is not unfair competition, and dismisses his complaint, that ends the matter as to him. He can never be heard in a court at all upon his complaint. On the other hand, if the decision goes against the corporation and it is adjudged to be guilty of unfair practices in violation of the law it may have a review in the courts—true a limited review, true a review as upon a writ of error in a law case, but still a review.

51 CONG. REC. 13,053

\* \* \*

AUGUST 1, 1914:

#### FEDERAL TRADE COMMISSION.

The Senate, as in Committee of the Whole, resumed the consideration of the bill (H. R. 15613) to create an interstate trade commission, to define its power and duties, and for other purposes.

51 CONG. REC. 13,100

\* \* \*

Mr. PITTMAN. Mr. President, I should like to ask the Senator from Iowa if his amendment provides for any form of appeal by one making complaint to the trade commission, in the event that the trade commission does not grant the remedy to which the complainant believes he is entitled?

Mr. CUMMINS. It does not. As I said yesterday, that involves opening up everything for a trial de novo. It is impossible to avoid that, if one who is denied relief is given the right to appeal; but I may say that this is not an adversary proceeding. The complaint is initiated by the commission and not by a third person.

Mr. PITTMAN. Is there any provision for a complaint being made by a third person?

Mr. CUMMINS. Oh, certainly; anyone has a right to file a complaint with the commission, and if the commission has reason to believe that this section of the law is being violated, it then serves notice of the complaint upon the person or corporation violating it and calls him or it before the commission.

Mr. PITTMAN. What would be the remedy of the complainant—that is, the individual or corporation suffering from oppressive acts complained of—if it should transpire that the trade commission had tendencies in favor of the oppressive corporation?

Mr. CUMMINS. Such a person would sue the offending corporation or association to recover damages.

Mr. PITTMAN. But he would have no remedy through the proposed commission?

Mr. CUMMINS. I think not; I hope not. This is a proceeding, as I said yesterday, for the benefit of the people of the country. It is intended to prevent unfair competition. Its enforcement is precisely like that of a criminal statute; society enforces the statute; society, through the commission



or through the Government, enforces the law, leaving each individual to the recovery of his damages according to the law, but not through the commission, which is a representative of the Government. That is the theory of the interstate-commerce law, and that is the theory of this proposed law.

51 CONG. REC. 13,102

\* \* \*

The PRESIDENT pro tempore. The question is on the adoption of the amendment of the Senator from Iowa [Mr. CUMMINS], in the nature of a substitute, on which the yeas and nays have been ordered. The Secretary will call the roll.

The Secretary proceeded to call the roll.

51 CONG. REC. 13,108

\* \* \*

So Mr. CUMMINS's amendment, in the nature of a substitute, was adopted.

51 CONG. REC. 13,109

\* \* \*

AUGUST 5, 1914:

The VICE PRESIDENT. . . .

The Senate, as in Committee of the Whole, has had under consideration a bill, the title of which will be stated by the Secretary.

The SECRETARY. A bill (H. R. 15613) to create an interstate trade commission, to define its powers and duties, and for other purposes.

51 CONG. REC. 13,309-310

\* \* \*

Mr. THOMAS. Mr. President, do I understand the bill is now in the Senate?

The VICE PRESIDENT. It is.

51 CONG. REC. 13,310

\* \* \*

Mr. POMERENE. Mr. President, I send to the desk an amendment to section 5; and before it is read I desire to make a very brief explanation.

This amendment is offered in lieu of section 5 as it was reported to the Senate from the Committee of the Whole, save only the proviso which has been adopted. It is the same amendment I proposed in the Committee of the Whole, with perhaps two modifications.

51 CONG. REC. 13,314

\* \* \*

My purpose in offering this amendment again is to call attention briefly to the very great difference between the provisions of the amendment offered by the Senator from Iowa and the provisions of that offered by myself in this respect. Under the amendment of the Senator from Iowa there is no provision whereby the complainant before the commission can have any hearing whatsoever if the decision of the commission is against him. I understand that this is not, in any ordinary sense of the term, an adversary proceeding; it is one sui generis. I care not, however, what it may be nominally; as a matter of fact, it will be an adversary proceeding, in that the commission will not be set in operation unless a complaint is made from somewhere, by somebody. Then, under the amendment as it was adopted in the Committee of the Whole, you will have this situation:

It may be that a complaint has been made by a person, a partnership, or a corporation against a person or partnership or corporation; and if the decision of the commission is in favor of the complainant, then the accused party can have the proceedings of the commission reviewed by making an application in the United States district court. If, however, the decision of the commission is against the complaining party, then the complaining party will have no right, under the machinery which is provided here, to a review in the courts above.

51 CONG. REC. 13,315

\* \* \*

Mr. CUMMINS. Mr. President, the amendment now proposed by the Senator from Ohio raises the whole issue between the broad and the limited review of the orders of the commission. It is the same amendment, with one material exception, that he proposed some days ago, which was the subject of a debate running over three or four days and which the Senate finally rejected by a decisive majority.

The material change made in the amendment now offered by the Senator from Ohio as compared with his former one is that the commission is given jurisdiction over persons and partnerships as well as corporations, but in so far as the review of the court is concerned the amendment now proposed is identical with the one he proposed formerly, and it overturns an established policy of the United States. It destroys, in my opinion, all the value of the commission which we are here creating. If his amendment is to prevail we had far better create a less expensive door for entrance into the courts than this commission.

Let us see what it does. In the first place, any individual, or corporation either, wronged by unfair competition practiced by anybody can sue in any court of competent

jurisdiction and can recover whatever damages such person or corporation may have suffered by reason of the unfair competition. That is an individual remedy which arises simply because the act declares unfair competition unlawful. The commission is intended to enforce the law for the public welfare. It is not intended to try cases between individuals engaged in business. If you make the commission simply the original trial court as between individuals who may be interested in unfair practices in trade, you will have destroyed, in my judgment, absolutely its usefulness as a public instrumentality for the purposes of correction.

51 CONG. REC. 13,315-316

\* \* \*

Mr. WALSH. Mr. President, I had occasion in the course of some remarks made the other day, when this matter was considered as in Committee of the Whole, to refer to the contention made that by this process of review the proceedings would drag their interminable length through the courts, and the suggestion carried with that remark was that you would get rid of the delay incident to the procedure of that character by the other system. It is reiterated by the junior Senator from Iowa [Mr. KENYON] now in this connection, and, of course, any comments that he may make upon this subject are entitled to very special consideration; but he will certainly coincide with the statement that I make, that under the plan proposed by the bill as it now stands the corporation against whom an order is issued may follow the matter through all the courts. It may arrest the operation of that order by beginning a proceeding in the district court; the district court affirming the order of the commission or sustaining it, the corporation may take an appeal to the circuit court

of appeals, and that tribunal determining against the corporation, the corporation may carry the case clear through to the Supreme Court of the United States. That is the situation there.

On the same plan, however, the man who makes the complaint is finally and absolutely concluded by the decision of the commission. So you do not hurry the matter one bit by the plan proposed. The right of review exists there, but exists only upon one side. True, the right of review exists only upon the evidence submitted against the contention made by the corporation, individual, or partnership against whom the order goes; but you do not hurry the determination a particle.

51 CONG. REC. 13,316

\* \* \*

MR. MYERS. Mr. President, I am even more heartily in favor of this amendment offered by the Senator from Ohio [MR. POMERENE] than I was in favor of his last amendment which he offered as in Committee of the Whole, which I supported in the Interstate Commerce Committee and on the floor of the Senate. I am more heartily in favor of this amendment because it provides for one more right of appeal—and a very important one, in my opinion—and that is the right of the complaining party, who is most vitally interested in anything that may arise under this bill and who, as the bill now stands, may be turned down by the commission and denied any relief whatsoever or even a hearing or a right to be heard.

\* \* \*

THE VICE PRESIDENT. The question is on the amendment offered by the Senator from Ohio [MR. POMERENE].

Mr. CUMMINS. Mr. President, upon that I ask for the yeas and nays.

The yeas and nays were ordered, and the Secretary proceeded to call the roll.

51 CONG. REC. 13,317

\* \* \*

So Mr. POMERENE's amendment was rejected.

51 CONG. REC. 13,318

\* \* \*

### CLAYTON ACT

AUGUST 25, 1914:

#### PROPOSED ANTITRUST LEGISLATION.

Mr. CULBERSON. I move that the Senate resume the consideration of the unfinished business.

The motion was agreed to, and the Senate, as in Committee of the Whole, resumed the consideration of the bill (H. R. 15657) to supplement existing laws against unlawful restraints of monopolies, and for other purposes.

51 CONG. REC. 14,200

\* \* \*

The SECRETARY. The next amendment is, on page 17, after line 21. to insert:

SEC. 9b. That authority to enforce compliance with the provisions of sections 2, 4, 8, and 9 of this act by the corporations, associations, partnerships, and individuals respectively subject thereto is hereby vested: In the Interstate Commerce Commission where applicable to common carriers and in the Federal trade commission where applicable to all other character of commerce, to be exercised as follows:

\* \* \*

Any party to any proceeding brought under the provisions of this section before either the Interstate Commerce Commission or the Federal Trade Commission, including the person upon whose complaint such proceeding shall have been begun, as well as the United States by and through the Attorney General thereof, may appeal from any final order made by either of such commissions to any court having jurisdiction to enforce any order which might have been made upon application of such commission as hereinbefore provided, at any time within 90 days from the date of the entry of the order appealed from, by serving notice upon the adverse party and filing the same with the said commission; and thereupon the same proceedings shall be had as prescribed herein in the case of an application by the same commission for the enforcement of its order as hereinbefore provided.

51 CONG. REC. 14,223-224

\* \* \*

Mr. CULBERSON. Mr. President, in view of the adoption of section 5 of the trade-commission bill, the committee desire to offer an amendment to this amendment. It will be presented by the Senator from Montana [Mr. WALSH].

Mr. WALSH. Mr. President, on behalf of the committee I offer the amendment which I send to the desk.

\* \* \*

The amendment brings, or attempts to bring, the procedure prescribed by section 9b of this bill into harmony with the procedure prescribed by section 5 of the trade commission bill. It will be recalled that in the discussion of that section it was pointed out that there was an essential difference between the method of procedure prescribed by that bill and that prescribed by the Clayton bill, the trade commission bill providing in substance that the order of the commission should be final except so far as it could be reviewed by proceedings brought to annul or set aside the order or any proceedings which might be brought to enforce the order; that it would have the same force and efficacy as



an order made by the Interstate Commerce Commission in an ordinary case coming before that body, while the Clayton bill, as reported, provided for a complete review in the courts of the order which should be made either by the trade commission or by the Interstate Commerce Commission. In other words, to use terser expressions, the trade commission bill provided for the narrow review, the Clayton bill provided for the broad review of the order.

It is well known likewise that I advocated the substitution of the procedure prescribed by this bill for the procedure prescribed by the trade commission bill. I argued as well as I could in favor of the principle embodied in this measure, and asked that it be given recognition in the trade commission bill, but I was defeated in that effort. The Senate expressed its views. The Senate having once decided upon the matter, I do not care to go over the ground again and argue the same matters the second time. Thus I have endeavored to harmonize the provisions, and this provision eliminates the review provisions as provided by it and provides that all of the proceedings under sections 8 and 9 shall be exactly as provided under section 5 of the trade commission bill.

51 CONG. REC. 14,224

\* \* \*

AUGUST 27, 1914:

#### PROPOSED ANTITRUST LEGISLATION.

The VICE PRESIDENT. The Senate resumes the consideration of the unfinished business, which is House bill 15657.

The Senate, as in Committee of the Whole, resumed the consideration of the bill (H. R. 15657) to supplement existing laws against unlawful restraints and monopolies, and for other purposes.

51 CONG. REC. 14,312

\* \* \*

The PRESIDING OFFICER. The question is on the committee amendment, section 9b, as amended.

The amendment as amended was agreed to.

51 CONG. REC. 14,323

\* \* \*

REPLY BRIEF FOR PETITIONER

IN THE  
UNITED STATES COURT OF APPEALS  
FOR THE  
DISTRICT OF COLUMBIA CIRCUIT

---

No. 24,629

---

UNITED STEELWORKERS OF AMERICA, AFL-CIO,  
Petitioner,

v.

FEDERAL TRADE COMMISSION,  
Respondent,

and

KENNECOTT COPPER CORPORATION,  
Intervenor.

United States Court of Appeals  
for the District of Columbia Circuit

FILED FEB 1 1971

*Nathan J. Paulson*  
CLERK

---

ON PETITION FOR REVIEW OF AN ORDER  
OF THE FEDERAL TRADE COMMISSION

---

Of Counsel:

BERNARD KLEIMAN  
10 South LaSalle Street  
Chicago, Illinois 60603

MICHAEL H. GOTTESMAN  
Bredhoff, Barr, Gottesman, Cohen & Peer  
1000 Connecticut Avenue, N. W.  
Suite 1300  
Washington, D. C. 20036

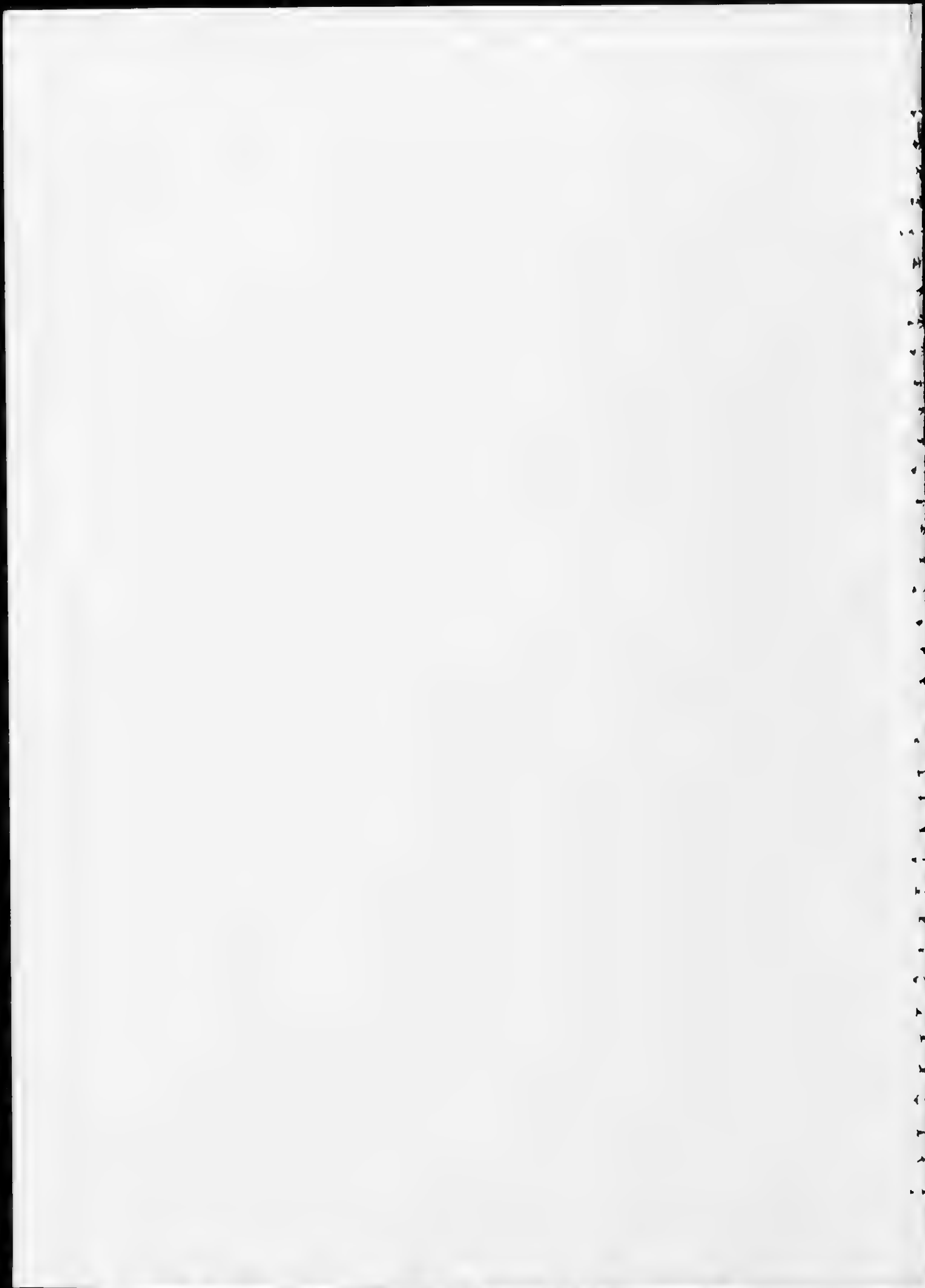
Attorneys for United Steelworkers  
of America, AFL-CIO

## TABLE OF CONTENTS

	page
I. INTRODUCTION.....	1
II. CASCADE NATURAL GAS CORP. V. EL PASO NATURAL GAS CO. SUPPORTS USWA'S ARGUMENT THAT REPRESENTATIVES OF THE AFFECTED CONSUMING PUBLIC ARE ENTITLED AS OF RIGHT TO INTERVENE IN FTC ANTITRUST PROCEEDINGS.....	3
III. THERE ARE NO DECISIONS HOLDING THAT AN INTER- VENOR IN AN FTC ANTITRUST PROCEEDING MAY NOT OBTAIN JUDICIAL REVIEW OF THE FTC'S FINAL DECISION ON THE MERITS.....	8
IV. THE TIME AT WHICH USWA SOUGHT INTERVENTION IN THE FTC PROCEEDING BELOW IS IRRELEVANT TO THE ISSUES ON REVIEW.....	12
V. THIS COURT HAS JURISDICTION TO ENTERTAIN USWA'S PETITION FOR REVIEW.....	13
CONCLUSION.....	15

## TABLE OF CITATIONS

<u>Cases</u>	<u>Page</u>
Cascade Natural Gas Corp. v. El Paso Natural Gas Co., 386 U.S. 129(1967). . . . .	3,4, 5,6,7,8
Commonwealth Edison Co. v. Allis-Chalmers Mfg. Co., 315 F.2d 564(7th Cir.1963), <u>cert</u> <u>denied</u> , 375 U.S. 834. . . . .	4
Consolidated Edison Co. of N. Y. v. DiNapoli, 39 L.W. 2239(S.D.N.Y.,Oct.16, 1970). . . . .	7
FTC v. Dean Foods Co., 384 U.S. 597(1966). . . . .	14
FTC v. Klesner, 280 U.S. 19(1929). . . . .	8
Harry Waller v. FTC (4th Cir.,Dec. 6, 1967, No. 11741,unreported order). . . . .	9
Hobson v. Hansen, 44 F.R.D. 18(D.D.C. 1968). . . . .	4
Honda v. Clark, 303 F. Supp 213(D.D.C. 1968). . . . .	4
Nuese v. Camp, 385 F.2d 694(D.C. Cir. 1967). . . . .	8
Old Colony Trust Co. v. Penrose Industries Corp., 387 F.2d 939 (3d Cir. 1968). . . . .	4
Sam Fox Publishing Co. v. U.S.,366 U.S. 683(1961). . . . .	4
S.E.C. v. Chenery Corp., 318 U.S. 80(1943). . . . .	13
Smuck v. Hobson, 132 U.S. App.D.C. 372, 408 F.2d 175(1969). . . . .	4
Spangler v. Pasadena City Board of Ed. 427 F.2d 1352 (9th Cir. 1970). . . . .	4
U.S. v. Aluminum Co. of America, 41 F.R.D. 342 (E.D. Mo. 1967) <u>aff'd</u> 388 U.S. 457. . . . .	6
U.S. v. Amer. Society of Composers, etc. 314 F.2d 1003 (2d Cir.1965). . . . .	4



# TABLE OF CITATIONS (cont'd)

<u>Cases</u>	<u>Page</u>
U.S. v. Atlantic Richfield Co., 50 F.R.D. 369, 5 CCH Trade Reg. Rep. ¶73,309(S.D.N. Y. 1970). . . .	6
U.S. v. Automobile Manufacturers Ass'n, 307 F. Supp. 617 (C.D. Calif. 1969), <u>aff'd</u> 397 U.S. 248. . . . .	7
U.S. v. Blue Chip Stamp Co., 272 F. Supp. 432 (C.D. Calif. 1967), <u>aff'd</u> , 389 U.S. 580 (1968). . . .	5, 6
U.S. v. First National Bank & Trust Co. of Lexington, 280 F. Supp. 260 (E.D. Ky.1967), <u>aff'd</u> sub. nom. Central Bank & Trust Co. v. U.S. 391 U.S. 496(1968). .	7
U.S. v. General Tire & Rubber Co., 5 CCH Trade Reg. Rep. ¶73,364 (N.D. Ohio 1970). . . . .	6
U.S. v. Radio Corp.of America, 186 F. Supp 776 (E.D. Pa. 1960) <u>app. dismissed</u> , 364 U.S. 518. . . .	4
U.S. v. Western Electric Co., Inc. 1968 Trade Cases ¶72,415 (D.N.J. 1968), <u>aff'd</u> 392 U.S. 659. . . .	5
 <u>Statutes</u>	
Administrative Procedure Act, 5 U.S.C. §§701-706. . .	2
Clayton Act	
Section 7, 15 U.S.C. §18. . . . .	2, 3
Section 14, 15 U.S.C. §25. . . . .	3
All Writs Statute, 28 U.S.C. §1651. . . . .	13, 14





REPLY BRIEF FOR PETITIONER

IN THE  
UNITED STATES COURT OF APPEALS  
FOR THE  
DISTRICT OF COLUMBIA CIRCUIT

---

No. 24,629

---

UNITED STEELWORKERS OF AMERICA, AFL-CIO  
Petitioner,

v.

FEDERAL TRADE COMMISSION,  
Respondent,

and

KENNECOTT COPPER CORPORATION,  
Intervenor.

---

ON PETITION FOR REVIEW OF AN ORDER  
OF THE FEDERAL TRADE COMMISSION

---

I. INTRODUCTION

As we stated in our opening brief (p. 5), USWA sought to accomplish three objectives by intervention in the FTC anti-trust proceeding below: (1) file a brief, (2) present oral argument, and (3) attain party status. The FTC granted us our first two objectives, but denied the third. It is the denial of party status below which USWA seeks review of in this court.

The real matter in issue here is whether third persons may obtain judicial review of final FTC decisions in anti-trust proceedings under the Clayton Act, and if so, whether they must be parties to the FTC proceeding in order to obtain such review. For, as we stated in our opening brief (pp. 7-9), the reason USWA sought party status was to insure its ability to secure judicial review of the FTC's final decision in the proceeding below, should that decision fail to find a violation of Section 7 of the Clayton Act and fail to order Kennecott to divest itself of Peabody Coal Company.

Hence, if any person aggrieved by the FTC's final decision may obtain judicial review thereof pursuant to the provisions of the APA (5 U.S.C. §§ 701-706), then we have not seriously been aggrieved by the FTC's denial of party status to us.<sup>1/</sup> Likewise, if the FTC and Kennecott are correct in asserting that no third person, whether a party to the antitrust proceeding or not, may obtain judicial review of the FTC's final decision, then USWA has not been seriously aggrieved by the denial of intervention as a party.<sup>2/</sup>

---

<sup>1/</sup> See, however, p. 8, n. 6 of our opening brief.

<sup>2/</sup> Ibid.

However, if party status is determinative of the class of third persons entitled to judicial review, then USWA has in fact been aggrieved by the FTC's refusal to grant it intervention as a party, and is presently entitled to judicial review of that refusal under the provisions of the APA.

II. CASCADE NATURAL GAS CORP. v. EL PASO NATURAL GAS CO. SUPPORTS USWA'S ARGUMENT THAT REPRESENTATIVES OF THE AFFECTED CONSUMING PUBLIC ARE ENTITLED AS OF RIGHT TO INTERVENE IN FTC ANTITRUST PROCEEDINGS.

The FTC's assertion that "(t)he government alone speaks for the public interest in antitrust proceedings" (brief, p. 21) is plainly wrong. The Supreme Court's decision in Cascade Natural Gas Corp. v. El Paso Natural Gas Co., 386 U. S. 129 (1967), makes this clear.

In our opening brief (pp. 13-14) we noted that the Supreme Court held in El Paso that consumer representatives were entitled to intervene as of right in a Section 7 Clayton Act proceeding brought by the Justice Department in a federal district court (pursuant to 15 U. S. C. § 25). We argued that it would be incongruous for the right of consumers to intervene to be dependent upon whether Clayton Act compliance is sought by the Justice Department or the FTC.

The FTC (pp. 21-23) and Kennecott (p. 11), in their respective briefs, make broadscale attempts to denigrate the Supreme

Court's holding, suggesting that hosts of subsequent cases have ignored or departed from it. None of these cases is at all in point. And the Supreme Court has never purported to recede from or limit its El Paso decision.

Several of the cases cited by the FTC and Kennecott had nothing whatsoever to do with antitrust proceedings under the Clayton Act.<sup>3/</sup>

Of those decisions cited which did arise in antitrust actions, none of them support the proposition that the Supreme Court's El Paso holding is limited or has been retreated from. Many of the cases cited were decided prior to the El Paso decision.<sup>4/</sup> Indeed, Justice Stewart, in his dissent in El Paso, cites two of these cases (Sam Fox Publishing Co. and Commonwealth Edison) as support for his proposition (disagreed with

---

<sup>3/</sup> Smuck v. Hobson, 132 U. S. App. D. C. 372, 408 F. 2d 175 (1969); Hobson v. Hansen, 44 F. R. D. 18 (D.D.C. 1968); Honda v. Clark, 303 F. Supp. 213 (D.D.C. 1968); Spangler v. Pasadena City Board of Ed., 427 F. 2d 1352 (9th Cir. 1970); Old Colony Trust Co. v. Penrose Industries Corp.; 387 F. 2d 939 (3d Cir. 1968).

<sup>4/</sup> Sam Fox Publishing Co. v. U. S., 366 U. S. 683 (1961); U.S. v. Amer. Society of Composers, etc., 341 F. 2d 1003 (2d Cir. 1965); Commonwealth Edison Co. v. Allis-Chalmers Mfg. Co., 315 F. 2d 564 (7th Cir. 1963), cert. denied, 375 U.S. 834; and U.S. v. Radio Corp. of America, 186 F. Supp. 776 (E.D. Pa. 1960), app. dismissed, 364 U.S. 518.

by the majority) that representatives of consumer interests are not entitled to intervene in antitrust suits.<sup>5/</sup>

In U.S. v. Blue Chip Stamp Co., 272 F. Supp. 432 (C.D. Calif. 1967), aff'd 389 U.S. 580 (1968)<sup>6/</sup> the court denied motions to intervene in an antitrust proceeding on the ground that they were untimely, where they were not filed until after the date of entry of a consent decree.<sup>7/</sup> The court distinguished El Paso by noting that the petitioners therein had filed their motions to intervene well in advance of the entry of a consent decree. Similarly, in U.S. v. Western Electric Co., Inc., 1968 Trade Cases ¶ 72,415 (D. N. J. 1968), aff'd 392 U.S. 659, a motion to intervene filed twelve years after entry of a

---

<sup>5/</sup> Of further interest is the fact that the FTC's argument that "A fortiori, intervention is improper when a private party, such as USWA, appears in a government suit to vindicate its theory of the public interest. The government alone speaks for the public interest in antitrust proceedings" (brief, p. 21) is taken almost verbatim from Justice Stewart's dissent in El Paso, 386 U.S. at 149, a proposition a majority of the Supreme Court was unwilling to agree with.

<sup>6/</sup> The FTC also cites Thrifty Shoppers Scrip Co. v. U.S. at p. 22, n.9 and p. 23, n. 12 of its brief, which is the very same case they also cite as Blue Chip Stamp Co.

<sup>7/</sup> There had been over two years of negotiations, during which time the government gave an opportunity for all interested persons to be heard, an opportunity not taken advantage of by the petitioners.

consent decree was denied, with the court citing Blue Chip. Likewise, in U.S. v. Aluminum Co. of America, 41 F.R.D. 342 (E. D. Mo. 1967), aff'd 388 U.S. 457, the district court denied a motion to intervene in an antitrust case filed over two years after an order of divorcement became final.

In U.S. v. General Tire & Rubber Co., 5 CCH Trade Reg. Rep. ¶ 73,364 (N.D. Ohio 1970), the court denied intervention to a trade relations association which sought to object to the terms of a proposed consent decree, since the government made it abundantly clear through disclaimers that the decree was not intended to imply that the association was in violation of the antitrust laws, and hence the association would not be harmed by the decree. El Paso was not mentioned at all in the court's decision. In U.S. v. Atlantic Richfield Co., 50 F.R.D. 369, 5 CCH Trade Reg. Rep. ¶ 73,309 (S.D.N.Y. 1970), a motion to intervene in an antitrust suit was denied where the petitioner did not have an interest relating to the subject matter of the action, i.e., lessening of competition in the marketing of gasoline, but rather where its claim related to an alleged trademark infringement. "Plainly they do not seek to preserve or restore the competitive vitality of the acquired company. This case is thus clearly distinguishable from Cascade



Natural Gas Corp v. El Paso Natural Gas Co. ... and from U.S. v. Simmonds Precision Products, Inc., Docket No. 67 Civ. 4506 (S.D.N.Y., June 30, 1970), where intervention was granted" (50 F.R.D. at 371).

In Utah v. Amer. Pipe and Construction Co. 50 F.R.D. 99, 5 CCH Trade Reg. Rep. ¶ 73,143 (C.D. Calif. 1970), petitioners' motive of trying to get their complaints related back to the time the government's suit was brought in order to circumvent the statute of limitations was the basis for denial of intervention. Consolidated Edison Co. of N.Y. v. Di Napoli, 39 L.W. 2239 (S.D.N.Y., Oct. 16, 1970), involved a denial of intervention in a private treble-damage action. In U.S. v. Automobile Manufacturers Ass'n, 307 F. Supp. 617 (C.D. Calif. 1969), aff'd, 397 U.S. 248, intervention was denied to persons seeking to block a proposed consent decree for the purpose of compelling the parties to litigate the case to a judgment which would then be used as a basis for their own private treble damage suits.

Furthermore, in U.S. v. First National Bank & Trust Co. of Lexington, 280 F. Supp. 260 (E.D. Ky 1967), aff'd sub. nom. Central Bank & Trust Co. v. U.S., 391 U.S. 496 (1968), the court, relying on El Paso, held that an individual, individually

and as a holder of stock in two banks which had decided to merge, was entitled as of right to intervene in an action brought by the U.S. challenging a bank merger. See also, Nuese v. Camp, 385 F. 2d 694, 701 (D.C. Cir. 1967), where, relying on El Paso, this court stated: "We hold that where protection of the competitive equality of state banks is the core of the federal statute controlling the branching of national banks, a state banking commissioner has an adequate interest in the construction of the federal act to justify intervention.

III. THERE ARE NO DECISIONS HOLDING THAT AN INTERVENOR IN AN FTC ANTITRUST PROCEEDING MAY NOT OBTAIN JUDICIAL REVIEW OF THE FTC'S FINAL DECISION ON THE MERITS.

Both the FTC (p. 34-35) and Kennecott (p. 14), in their respective briefs, urge that the Supreme Court's decision in FTC v. Klesner, 280 U.S. 19(1929) would preclude USWA from obtaining judicial review of the Commission's final decision, even if USWA was a party to the proceeding below. Klesner does not so hold, however. Aside from the fact that that case dealt with proceedings under the Federal Trade Commission Act, not those under the Clayton Act, Klesner states only that a "complainant" is not automatically made a party to an FTC proceeding by the mere fact of having complained to the FTC of an

alleged violation of the Act. The Supreme Court was careful to point out that the complainant may seek to intervene under the intervention provision of the Act, 280 U.S. 26, n. 2. He must, of course, first establish "good cause" as required by the intervention provision, and not every complainant could make a showing of good cause (ie. show he would be "aggrieved" by the final FTC order -- see our opening brief, pp. 9ff). The Supreme Court in Klesner said no more than that a complainant is not automatically made a party. It did not say that one who is entitled to intervene by making a showing of good cause may not obtain judicial review of the final FTC decision.<sup>8/</sup>

A further case relied on by Kennecott (brief, p. 14), Harry Waller v. FTC (4th Cir., Dec. 6, 1967, No. 11741, unreported order), is of little persuasion. Also arising

---

<sup>8/</sup> Furthermore, the FTC's suggestion (brief, pp. 33-34) that USWA is merely trying to remedy "labor evils" in seeking divestiture of Peabody by Kennecott -- that it is merely trying to remedy private wrongs -- is erroneous. Our motion to intervene and our opening brief (pp. 3-4) made it clear that USWA was primarily seeking to vindicate the consuming public's interest in a freely competitive market.

under the Federal Trade Commission Act, not under the Clayton Act, the petition for review which was dismissed in that case was filed pro se by Harry Waller, a person "in the petroleum business continuously and uninterruptedly since 1929." 9/ Waller had not intervened in the FTC proceeding (nor does it appear that he attempted to do so), and he advanced no substantiated arguments supporting his claim that the Court of Appeals had jurisdiction.10/

---

9/ Waller's petition for review read as follows:

"Now comes Harry Waller, an aggrieved petitioner, who begs your indulgence and consideration for a review of the illegal, immoral, and uneconomical Federal Trade Commission's administrative dismissal of case number 8539.

Your aggrieved petitioner, Harry Waller, the originator of the Federal Trade Commission action, has been in the petroleum business continuously and uninterruptedly since 1929, and sincerely believes that my personal and property rights will be adversely affected; my future business rights impaired, and my business property values deflated through economic reprisals and restrictive product supplies availability if the oligarchy's decision (F.T.C.) is not reviewed and reversed."

[Copies of the papers filed in the Waller case can be found in the public records of the FTC.]

10/ Waller's entire "argument" to the Fourth Circuit respecting the court's jurisdiction, submitted in a brief delivered on the day of oral argument in the FTC's motion to dismiss the petition, December 4, 1967, is as follows:  
(cont. on p. 11)

10/ (cont.)

"The facts as found by the Hearing Examiner were to the effect that the actions of Crown Central as to Waller were to his prejudice and affected his personal or property rights specifically as well as injury to the public generally. The facts indicate that his personal or property rights were adversely affected by the actions of Crown Central and that the actions of Crown Central, if permitted to continue, would be continuously prejudicial to him. It follows, therefore, that the dissolution of the Cease and Desist Order by the Commission is a decision that adversely affects the petitioner in that it permits the continuing actions of Crown Central.

Generally speaking, the decisions indicate that a person aggrieved by the decision of an administrative board or commission is one whose personal or property rights are adversely affected by the decision of the administrative body. The decision must not only affect the matter in which the protestant has a specific interest or property right, but his interest therein must be such that he is personally and specially affected in a way different from that suffered from the public generally. The circumstances under which this occurs have been determined by the courts on a case by case basis and the decision in each case rests upon the facts and circumstances of the particular case under review.

In a mandamus action, the allegations of the party as to how he is specially damaged must be definite and must meet the burden of showing such special damage by competent evidence. Generally in cases involving appeals from administrative decisions, it is sufficient of the fact constituting aggrievement appear in the petition for appeal either by express allegation or by necessary implication.

Your petitioner asks that you take judicial notice of the various Press and trade media concerning the political overtones and outside influences in the affairs of the Federal Trade Commission and other governmental agencies.

Still further, if the Big Oil Monopolists have their Paid Press, Kept Radio and Timid TV, do they also have at their command a Restrained Judiciary?"

IV. THE TIME AT WHICH USWA SOUGHT INTERVENTION  
IN THE FTC PROCEEDING BELOW IS IRRELEVANT  
TO THE ISSUES ON REVIEW.

Kennecott, both in its brief (pp.1,15) and in its memorandum in support of its motion to dismiss the petition for review (pp. 1,3-4), urges that USWA's motion to intervene below was untimely. Such simply is not the case.

As we pointed out in our opening brief (p.3), our desire to participate directly in the proceedings below arose after the hearing examiner issued his initial decision dismissing the complaint against Kennecott. We felt that this decision was plainly wrong on the basis of the record as theretofore compiled. We did not seek to re-open the hearing or to adduce additional evidence. We sought only the rights of an intervenor at the stage at which we sought intervention, namely, at the stage of complaint counsel's appeal to the Commission itself.

It is significant that nowhere in its orders denying USWA intervention as a party (App. 18-19, 24-25) does the Commission in any way purport to base its decision on the timeliness of our intervention motions. Nor does the FTC, in its brief, in any way urge that USWA's motions to intervene were denied because untimely. It is, of course, well settled that agency action cannot be judged on grounds not relied upon by the agency itself



in taking such action. S.E.C. v. Chenery Corp., 318 U.S. 80, 87 (1943).

Furthermore, contrary to Kennecott's assertion (brief, p. 4), USWA in no way enlarged or attempted to enlarge the record in its brief or oral argument before the Commission. Our argument before the Commission was based solely on the record evidence adduced before the hearing examiner (App.-Vol. 2, pp. 25-48).

V. THIS COURT HAS JURISDICTION TO ENTERTAIN  
USWA'S PETITION FOR REVIEW

In our opening brief (pp. 24-27) we set forth the reasons why this Court has jurisdiction to review the FTC's order denying USWA intervention as a party in the proceeding below. The FTC and Kennecott have said nothing which detracts from this proposition. For, if party status is determinative of the class of aggrieved persons who may obtain judicial review of a final FTC order dismissing the complaint following a full administrative adjudication in a Clayton Act antitrust proceeding, and if, as we argued in our opening brief (pp. 25-26), this Court is the proper forum to review such FTC decisions, then this Court, in order to aid such appellate jurisdiction, is the proper forum to review an FTC order denying a third person intervention as a party (opening brief, pp. 26-27). 28 U.S.C. §1651, commonly referred to as



the "All Writs Statute", provides, in part:

(a) The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.

In other words, if an FTC decision dismissing an antitrust complaint following a full administrative adjudication is reviewable by this Court on the petition of third parties (the only parties which could seek such review, for the FTC itself obviously cannot seek review of its own order), then 28 U.S.C. §1651 gives this Court the power to review FTC orders denying third persons intervention as parties, in order to preserve its potential jurisdiction to review the final FTC decision on the merits of the antitrust proceeding. For otherwise, the FTC could insulate its decisions from judicial review by merely denying intervention to any third parties, whether they made a showing of "good cause" or not. The Supreme Court, in FTC v. Dean Foods Co., 384 U.S. 597 (1966), similarly so held when it said that the Court of Appeals has jurisdiction under the All Writs Statute to issue preliminary injunctions preserving the status quo after the FTC has issued a Clayton Act complaint, but prior to a final administrative adjudication, in order to protect its potential jurisdiction where an appeal is not then pending but may later be perfected.

CONCLUSION

For the reasons set forth above and in our opening brief, the Order of the FTC denying USWA's motion to intervene as a party in the proceeding below should be reversed.

Respectfully submitted,

Michael H. Gottesman

Michael H. Gottesman  
Bredhoff, Barr, Gottesman, Cohen & Peer  
1000 Connecticut Avenue N. W.  
Suite 1300  
Washington, D. C. 20036

Of Counsel:

Bernard Kleiman  
10 South LaSalle Street  
Chicago, Illinois 60603

Attorneys for United Steelworkers  
of America, AFL-CIO